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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Was it a violation of Title VII, under the reasoning of *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978), for the State of Arizona to contract with independent insurance companies which used sex-based actuarial tables for the purpose of giving its employees the option of receiving their deferred compensation in the form of annuity payments, even though:

(a) the employees could elect to receive their deferred compensation in a lump sum and purchase the largest benefit which their accumulated contributions could command on the open market;

(b) all of the insurance companies which were available to the State of Arizona to provide such life annuities used sex-based mortality tables and therefore Arizona had no choice but to offer sex-based life annuities if that option was to be offered at all; and

(c) the district court found that Arizona had no intent to discriminate because the sex-based actuarial tables were the result of the judgment of the insurance companies?

2. Was it an abuse of discretion and/or did it violate the Tenth Amendment for a federal court to order the State of Arizona to supplement the future life annuity payments paid by independent insurance companies to female employees in order to make them equal to those made to similarly situated male employees:

(a) where the state legislature explicitly provided that no contribution was to be made by the state to the deferred compensation plan; and

(b) where the state was not responsible for the establishment or use of the actuarial tables upon which the independent insurance companies based these life annuities?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are Nathalie Norris, on behalf of herself and all others similarly situated, plaintiff-appellee; Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, the State of Arizona, and Richard Rabago, Margaret Griffith, Ted Williams, Russ Webb, Walter Madsen, Dave Conner and Jack La Sota in their capacity as members of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, defendants-appellants below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, State of Arizona ("Arizona"), Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Governing Committee") and the individual members thereof in their official capacity, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on March 11, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 330 (9th Cir. 1982) (Appendix A hereto). The opinion of the United States District Court for the District of Arizona entered March 12, 1980 is reported at 486 F. Supp. 645 (D. Ariz. 1980) (Appendix B hereto).

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1982. The Petition for Writ of Certiorari has been timely filed in accordance with the Order of Justice Rehnquist dated May 13, 1982 which extended the time for filing the petition to and including July 12, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Tenth Amendment to the United States Constitution, several provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2, and Sections 38-871 to 38-874 of the Arizona statutes.

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Title VII of the Civil Rights Act of 1964, as amended, provides in the relevant section:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. Section 2000e-2(a)(1)

A.R.S. Sections 38-871 to 38-874 are printed in full in Appendix C hereto.

STATEMENT OF THE CASE

If any deferred compensation or retirement plan should be held *not* to violate this Court's decision in *Manhart,*[1] the Arizona plan involved here is it. The deferred compensation plan held unlawful under Title VII by the courts below permitted each employee to defer whatever portion of his or her compensation he or she chose and thereafter to recover the full amount upon retirement (1) in a lump sum so that the retiree could purchase "the largest benefit which his or her accumulated contributions could command in the open market," *see Manhart, supra,* 435 U.S. at 717; (2) in a fixed monthly amount over a specified period of time; or (3) in the form of a life annuity with the monthly payments being made by an independent insurance company. The employer, the State of Arizona, made no contributions. The courts below held the plan unlawful under Title VII because the life annuity payments were calculated by the insurance companies on the basis of sex-based mortality tables. However, all of the insurance companies which were available to Arizona to provide life annuities used such sex-based mortality tables. If *Manhart* is extended to cover such a situation, then this case clearly has serious consequences not only for many employers, but also for the insurance industry.

In 1972, the State of Arizona enacted A.R.S. Sections 38-871 through 38-874 which established a Governing Committee for the purpose of establishing a deferred compensation plan.[2] In contrast with Arizona's separate and mandatory retirement plan[3], the purpose of the voluntary deferred compensation

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[1] *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978).

[2] There is no attack on the statutes which established the deferred compensation plan nor the plan itself, but only on that option selected by the Governing Committee which offered a life annuity.

[3] Arizona has an entirely separate and independent state retirement plan. See A.R.S. §§ 38-741 through 38-781.36, as amended. The retirement plan is mandatory, and contributions and benefits are equal for similarly situated males and females.

plan is solely to enable state employees to defer the receipt of a portion of their compensation until a later date to obtain tax benefits. Accordingly, the plan is financed solely through the employees' deferment of their income; there are no employer contributions to the plan.

The deferred compensation plan works in two phases. During the first or "accumulation" phase, employees are free to choose from a wide variety of investments into which their deferred compensation can be directed, including savings accounts, mutual funds, life insurance, or annuities. Amounts contributed by a male or female employee earn investment income at the same rate. There has been no attack on this phase of the plan.

During the second or "pay-out" phase, the employees have equally wide choices as to how their deferred funds shall be repaid to them. Once an employee retires, the employee can elect to have his deferred compensation paid back through a variety of means: the employee can elect (1) to have his deferred compensation and earnings thereon paid to him in one lump sum, (2) to receive a specific sum each month for a fixed number of months, or (3) to receive it in the form of a life annuity.

On April 25, 1978, plaintiff Nathalie Norris on behalf of herself and the class of females now or in the future enrolled in the deferred compensation plan brought an action against petitioners, alleging that the differential in monthly benefits produced by the life annuities for men and women constituted a violation of Title VII by her employer by reason of this Court's decision in *Manhart*, as well as a violation of the Fourteenth Amendment. Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343.

Both petitioners and respondent moved and cross-moved for summary judgment in the district court on the basis of a joint statement of stipulated facts. The district court deter-

mined that petitioners were in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.*, on the ground that the benefits paid by the insurance companies under the life annuity option were determined on the basis of sex-based mortality tables and were thus unlawful under the *Manhart* decision. However, the district court specifically found that Arizona and the Governing Committee did not purposefully discriminate against female employees so as to violate the Fourteenth Amendment and dismissed that claim. The district court enjoined petitioners from carrying out their obligations under the deferred compensation plan through the use of sex-based actuarial tables and directed that future annuity payments to retired female employees be made equal to those for similarly situated male employees.

Petitioners timely appealed the decision, and the Court of Appeals affirmed the judgment. The inevitable result of this decision has been to force petitioners to remove the life annuity option from the available offerings pending a final decision of this issue. Now none of the 35,000 state employees, male or female, who have not yet retired, can select the life annuity option and all are thus equally treated. Only those female employees who have already retired and selected the life annuity option can be said to have been benefited by this decision. The State of Arizona which must make up the difference on monthly payments, the active employees who have lost the option of a life annuity, and the insurance companies which have lost that potential business are the losers.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision In The Instant Action Improperly Extends The Holding Of Manhart To Impose Liability On An Employer For The Practices Of Independent Insurance Companies And Therefore Presents An Important Question Which This Court Should Settle.

A. *The Lower Courts Have Had Extreme Difficulty In Applying This Court's Decision In Manhart To More Complicated Cases and Clarification By This Court Is Required.*

In *Manhart* this Court held that the requirement that men and women make unequal contributions to an "employer-operated pension fund" violated Title VII. The decision was therefore quite narrow; no private insurance companies were involved. In contrast, the cases which have now appeared in the lower courts are more complicated, and the difficulties involved in applying *Manhart* to such cases are becoming apparent.[4]

When the court of appeals in *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), reversed the lower court's dismissal of the complaint which had been brought against Colby College on account of the use of sex-based actuarial tables in pension plans provided by its insurers (TIAA-CREF), it did not even try to fully resolve the case. Instead it sent the case back to the lower court to grapple with it further. The court of appeals candidly recognized that it foresaw "difficulties, possibly very great difficulties, that did not arise in *Manhart*, in light of the Court's caveat that the statute was not intended to revolutionize the [insurance] industry." 589 F.2d at 1144. The court of appeals further noted that "[w]hether by accident, or

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[4] *E.g., EEOC v. Colby College, supra*, 589 F.2d 1139; *Spirt v. Teachers Insurance and Annuity Association*, 475 F. Supp. 1298 (S.D.N.Y. 1979); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979); *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979); *Women in City Government v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Hannahs v. N.Y. State Teachers' Retirement System*, 26 EPD ¶ 32,037; 26 FEP Cases 527 (S.D.N.Y. 1981).

design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." 589 F.2d at 1143.

In *Sobel v. Yeshiva University,* 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), the district court called the problems arising from unequal benefits provided by a pension fund "vexing" and stated that "this results from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." It concluded that the issue could not be decided on a summary judgment.

Other courts have resorted to characterizing the insurance carrier as an "employer" of the plan participants in order to find liability under Title VII pursuant to *Manhart. E.g., Spirt v. Teachers Insurance and Annuity Assn.,* 93 F.R.D. 627 (S.D.N.Y. 1982) and 475 F. Supp. 1298 (S.D.N.Y. 1979), and *Peters v. Wayne State,* 476 F. Supp. 1343 (E.D. Mich. 1979), *appeal pending,* No. 79-1676 (6th Cir.).

The decisions in the *Spirt* case dramatically demonstrate the problems the lower courts are encountering in attempting to eliminate all actuarially-based distinctions between the sexes. When the EEOC and the insurer (TIAA-CREF) attempted to compromise their differences by the use of a new unisex table, the New York Superintendent of Insurance refused to approve its use on the ground that it unfairly resulted in lower income benefits for males than "would have been payable had the sex-distinct mortality basis been retained." *BNA Pension Reporter,* No. 336, A-12 *et seq.* (April 6, 1981). The EEOC then filed suit against the Superintendent to enjoin him from applying the New York insurance law in conflict with the United States Constitution, Title VII, and the Equal Pay Act. TIAA-CREF then negotiated a new unisex plan which was approved by the Superintendent but held by the EEOC to violate both Title VII and the Equal Pay Act. *Spirt, supra,* 93 F.R.D. at 632. An appeal is now pending. Thus, the lower courts are now faced with disputes between the states' right to regulate the business of insurance and the federal government's power to prevent discrimination.

In another suit involving TIAA-CREF, *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *appeal pending*, No. 79-1676 (6th Cir.), the court felt free to render a decision holding the sex-segregated tables in violation of Title VII while not dealing with any of the financial implications since it awarded only declaratory and injunctive relief "enjoining TIAA and WSU from continuing with the TIAA retirement plan." Since TIAA must obtain the approval of the New York insurance regulators, its state of domicile, however, it is obvious that the district court in *Peters* does not have the power to carry out its mandate in its present form. Moreover, an appeal of the trial court's ruling is now pending.

The instant case went even further than any previous case. Unlike previous cases where the insurance company had a possibly symbiotic relationship with the employer, or the employer took an active role in administering the allegedly discriminatory annuity, private independent insurance companies are involved here. The court below held Arizona liable under Title VII even though (1) all insurance companies available to contract with Arizona used sex-based mortality tables and (2) a lump sum option was available to all participants.

Accordingly, there is great confusion in the lower courts as to the reach of *Manhart* and this Court's clarification and guidance is necessary.

B. *The Extension of* Manhart *In This Case To Impose Liability On An Employer For Practices Of Private Insurance Companies Would Revolutionize The Insurance And Pension Industries, Which Is Precisely What This Court Warned Against In* Manhart.

In *Manhart*, the pension fund in issue was administered entirely by the defendant employer. The defendant required female employees to make monthly contributions to the pension fund which were 14.84% higher than the contributions required of comparable male employees because women as a class live

longer than men and therefore more monthly payments could be expected to be made to the average woman than to the average man. Since the employee contributions were withheld from the paychecks, a female employee took home less pay than a male employee earning the same salary.

However, this Court explicitly limited its holding in *Manhart* to the facts of that case and stated that it was not suggesting that Title VII was intended to revolutionize the insurance and pension industries:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund.

435 U.S. 702, 717.

Unlike *Manhart* where the employer was responsible for the unequal treatment in contributions between men and women, in the instant case private insurance companies are responsible for the payment of the annuities based on sex-based mortality tables. The State of Arizona merely purchased contracts from insurance companies in order to provide its employees with a life annuity option if they chose to exercise it.

Additionally, in the instant case, all insurance companies available to contract with Arizona used sex-based mortality tables. Accordingly, Arizona had no choice but to offer life annuities calculated on sex-based mortality tables if it were to offer the life annuity option to its employees at all.

Hence, although the plaintiff brought her complaint against Arizona as her employer, her complaint really challenges the practices of the non-party, independent insurance carriers. If employers are held liable for the practices of the insurance industry, then many employers will, as Arizona has already done, cease to offer life annuities to their employees. This will have a profound effect on the insurance and pension

industries, as well as on all employees. Given the large amount of business which the insurance and pension industries do with employers, the imposition of Title VII liability on an employer because of the practices of the insurance companies with which it contracts will "revolutionize the insurance and pension industries," which is precisely what this Court warned that *Manhart* was not intended to do.

If the insurance and pension industries are to be prevented from using sex-based mortality tables, this should be done directly through legislation specifically attacking those practices, with the benefit of open hearings and public debate as to the consequences of such legislation and the relative merits of current insurance practices. Petitioners submit that the use of Title VII against employers, such as the State of Arizona, in order to challenge the practices of the insurance industry is an important issue, the propriety of which should be settled by this Court.[5]

C. *The Court of Appeals' Decision Conflicts With The Open Market Exception Pronounced In* Manhart.

In *Manhart,* this Court stated:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-718.

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[5] Although a number of lower courts have found employers who contract with insurance companies liable under Title VII pursuant to *Manhart,* those cases are fully distinguishable from the instant one. In each of those cases, the employer had either taken an active role in administering or developing the allegedly discriminatory annuity or the court had reached the dubious conclusion that the insurance company was in fact an "employer" under Title VII. *E.g., Henderson v. State of Oregon,* 405 F. Supp. 1271 (D. Ore. 1975); *Spirt v. Teachers Insurance and Annuity Association,* 475 F. Supp. 1298 (S.D.N.Y. 1979); *Equal Employment Opportunity Commission v. Colby College,* 589 F.2d 1139 (1st Cir. 1978); *Peters v. Wayne State University,* 476 F. Supp. 1343 (E.D. Mich. 1979). There are no lower court cases, other than the instant one, where an employer has been held liable for the practices of independent insurance companies simply because it contracted with those companies.

There are two reasons why the instant case falls squarely within such open market exception. First, unlike the pension plan in *Manhart*, equal contributions are set aside *(i.e.*, each employee is free to defer whatever amount he or she chooses), and the employees have the option of receiving their deferred compensation in the form of a lump sum so that they can purchase the largest benefit available in the marketplace.

Second, the instant case falls within the open market exception because the life annuities offered through Arizona's plan fully represent those available on the open market. Since it has been stipulated that all insurance companies available to Arizona used sex-based mortality tables for their annuities, an employee could purchase no greater benefit on the open market than he could under Arizona's deferred compensation plan.

Nonetheless, the Court of Appeals in the instant case rejected petitioners' claim that the Arizona plan fell within the open market exception of *Manhart*. It ruled that although a lump sum option was available to employees to purchase the largest benefit which they could on the open market, Arizona was nevertheless liable because its plan also offered life annuities based on sex-based mortality tables. Although the life annuities offered by petitioners' plan mirrored what was available on the open market, the Court of Appeals ruled that by offering the annuities as part of the plan, Arizona "discriminated" against women. 671 F.2d at 335.

Since petitioners offered only what the open market made available, petitioners must be found to have satisfied the open market exception in *Manhart* if that exception is to have any meaning. The lump sum option was available to purchase anything desired on the open market and the additional option of life annuities simply gave employees the opportunity of

further deferring their taxes.[6] *Manhart's* open market exception cannot mean that participants should not be given the option of purchasing annuities which mirror the open market through the employer's plan. Petitioners submit that the Court of Appeals' decision conflicts with *Manhart* and that the issue of a meaningful open market exception to *Manhart* is an important question which should be settled now.

II. This Case Poses The Important Question Of Whether An Employer Should Be Held Liable Under Title VII For Practices In The Marketplace Over Which It Has No Control.

In the instant case it was stipulated that the only actuarial tables in use by the insurance industry were sex-based. If Arizona was to offer a life annuity option to its employees at all, it had no choice but to offer life annuities based on the sex-based mortality tables utilized by the insurance industry.

Petitioners argued in the Court of Appeals that they should not be held liable under Title VII where the benefits which they could offer to their employees were limited by the marketplace. Recent decisions of this Court evidence that a defendant will not be held to have discriminated against women because of conditions which exist in the marketplace which conditions were not created by the defendant. *Harris v. McRae,* 448 U.S. 297 (1980); *General Electric Co. v. Gilbert,* 429 U.S. 125, 134 (1976).

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[6] The reason that Arizona offered life annuities as part of the plan was because this insured that employees would be able to qualify for the desired tax benefits, see Rev. Ruling 68-99 and 72-25, Internal Revenue Cumulative Bulletins 1968-1 and 1972-1, respectively. Since employees who took their deferred compensation in a lump sum would be taxed immediately on that sum, Arizona simply wanted to grant its employees as many options to obtain tax-deferred benefits as it could by offering life annuities so as to spread out the income subject to tax. The court of appeals ruled that by offering this additional tax savings, rather than forcing the employees to take their deferred compensation in a lump sum and then use the money to purchase similar annuities on the open market, Arizona was ineligible for the open market exception.

In *Gilbert* this Court held that the exclusion of coverage in General Electric's disability plan for disabilities arising from pregnancy did not constitute prohibited sex discrimination in violation of Title VII. In so ruling, this Court expressly recognized that the employer was not responsible for the fact that coverage for pregnancy would impose an additional cost for the coverage purchased on the open market. The employer's mere failure to purchase that additional coverage for females was therefore not prohibited discrimination:

> If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to preganancy. . . . Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount.

429 U.S. 125, 139 n.17.[7]

Likewise, in *Manhart*, this Court suggested that the fact that a female could not purchase as large a benefit as a male employee on the open market should not subject the employer to liability under Title VII:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-18.

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[7] Congress had to enact a statute in order to overturn the *Gilbert* decision so as to modify Title VII to require coverage for pregnancy disability. 42 U.S.C. § 2000e(k). Similarly here, the enactment of a statute, after reasoned debate, should be necessary if the drastic step of extending Title VII to the practices of the insurance industry is to be taken.

Again, in *Harris v. McRae, supra,* 448 U.S. 297, this Court considered, *inter alia,* whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravened the Fifth Amendment. In holding that it did not, this Court explained that while the state itself may not impose obstacles in the exercise of a woman's freedom of choice, it need not remove those obstacles not of its own creation:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher:* although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

448 U.S. at 316.

In the instant case, Arizona is not responsible for the fact that the insurance industry determines benefits payable from life annuities on the basis of sex-based actuarial tables. Accordingly, the fact that Arizona had no choice but to offer life annuities based on sex-based mortality tables is not an obstacle of the State's own creation. Likewise, the fact that Arizona affirmatively offered a plan which failed to compensate for the additional cost to females of purchasing annuities in the marketplace is no different from the fact that General Electric affirmatively offered a disability plan which failed to compensate for the additional cost of including coverage for pregnancy disability. In each case, a plan was offered at equal cost to males and females and any difference in treatment was the result of the additional expense of providing this particular service to women in the marketplace. It should be noted that under Arizona's deferred compensation plan, Arizona does not contribute anything to either male or female employees. It merely provides a means by which employees may obtain tax-deferred treatment of that portion of their compensation, which they choose to have deducted from their wages.

However, the Court of Appeals in the instant case ruled that Arizona was liable under Title VII, despite the fact that it was not responsible for the use of sex-based mortality tables by insurance companies in the marketplace. The Court of Appeals ruled that "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." 671 F.2d at 335. No authority was given for this proposition.

Petitioners submit that the Court of Appeals' ruling is not only in conflict with the applicable decisions of this Court cited above, but that the issue whether an employer can be held liable under Title VII for the limitations of the marketplace, over which it has no control, is an important question which should be definitively settled by this Court. There are presently a number of cases before the lower courts in which the issue of the responsibility of an employer for the practices of insurance carriers have been raised.[8] Because of the number of cases in which the lower courts have extended *Manhart* to impose liability on a employer for the practices of insurance companies, this question is one which should be settled now.

III. The Court Of Appeals' Decision In The Instant Case Conflicts With A Series Of This Court's Decisions Which Require Proof Of Intent In Cases Alleging Discriminatory Treatment Under Title VII.

It is now well settled in this Court that where an employee alleges less favorable treatment on the basis of race or sex under Title VII, proof of discriminatory motive "is critical."

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[8] *E.g. EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Spirt v. Teachers Insurance and Annuity Association*, 475 F. Supp. 1298 (S.D.N.Y. 1979); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Michigan 1979); *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979). The instant case, however, is the first such case where an employer has been held liable under Title VII for merely contracting with independent private insurance companies generally. Further, in none of the other cases had there been a stipulation that the only annuities available were those based on sex-based mortality tables.

Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); *accord, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 580 (1978); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-806 (1973).

Most recently, in *Burdine,* this Court held that in Title VII cases involving discriminatory treatment, "[t]he ultimate burden of persuading the trier of fact that the defendants *intentionally* discriminated against the plaintiff remains at all times with the plaintiff." [Emphasis added] *Id.* at 253.

However, the Court of Appeals in the instant case rejected the requirement of intent and held that "*Manhart* required no affirmative showing of intent. Nowhere was the need to prove intent discussed." 671 F.2d at 333. The Court of Appeals erroneously reasoned that because the issue of intent was not discussed in *Manhart,* the *Manhart* decision should be interpreted as not requiring any showing of intent.[9]

However, the instant case is much different from *Manhart. Manhart* involved an *employer-operated* pension fund; by administering and using a sex-based mortality table the employer required women to make larger contributions than men and therefore clearly intended to treat women differently than men. Intent to discriminate was obvious in *Manhart;* it was not

[9] The Court of Appeals did not cite *Burdine, Furnco,* or *Teamsters* but instead cited two pre-1977 Ninth Circuit decisions, *Krause v. Sacramento Inn,* 479 F.2d 988 (9th Cir. 1973), and *Schaeffer v. San Diego Yellow Cabs, Inc.* 462 F.2d 1002, 1006 (9th Cir. 1972). Neither of these cases is relevant here. Both reflected specific employer action directly limiting employment opportunities, contrary to Arizona's "action" here which was to "offer" annuity plans which the open market would provide. Moreover, both *Krause* and *Schaeffer* involved employment decisions which locked women out of employment opportunities. In *Krause,* the employer refused to hire a woman as a bartender; *Schaeffer* involved a Title VII challenge to the rule of a taxi company which refused to permit female drivers to work more than eight-hour days, although male drivers were allowed to work nine-hour days. Clearly, in both cases, the defendant intended to treat females differently than males and the employer itself was responsible for the practice which treated them differently; neither case stands for the proposition that no showing of intent is necessary.

therefore an issue. However, in the instant case, Arizona did not itself discriminate, and it was not responsible for the practice which treated females differently than males. That treatment was the result of the sex-based mortality tables administered and used by the private insurance companies. Arizona had no choice: the only available life annuities were based on sex-based mortality tables. Accordingly, there was no showing of an intent to discriminate and a Title VII claim has not been made out. Indeed, the district court expressly found that the petitioners did not have a discriminatory motive and therefore held that the petitioners had not violated the Equal Protection Clause of the Fourteenth Amendment:

> From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are the results of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment. The Court finds that it does not.

Norris v. Arizona Governing Committee, 486 F. Supp. 645, 651 (D. Ariz. 1980).

Accordingly, the Court of Appeals' decision in the instant case conflicts with the decisions of this Court which require proof of discriminatory intent where discriminatory treatment is alleged.

IV. The Relationship Between The Tenth Amendment And The Fourteenth Amendment Is An Important Issue Which This Court Should Settle.

Under the Arizona statute which enacted the deferred compensation plan, the plan was to operate "without cost or contribution from the state. . . ." A.R.S. § 38-871 C. The plan was entirely financed by deductions from employee compensation in the amount selected by that employee.

In the instant case, the relief ordered by the district court required, *inter alia,* the State of Arizona to contribute to the plan to equalize the benefits received by males and females. The Ninth Circuit affirmed this award. Such an award overturns the nondiscriminatory legislative judgment of the State of Arizona that no contribution from the State's budget should be made to the tax-deferred compensation plan.

In *National League of Cities v. Usery,* 426 U.S. 833 (1976), this Court held that Congress may not exercise its power to regulate commerce "so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." *Id.* at 855. There, plaintiffs challenged the validity of the 1974 Amendments to the Fair Labor Standards Act which extended the minimum wage and maximum hour provisions to almost all public employees employed by the states and by their various political subdivisions. Citing the increased costs which the application of the 1974 Amendments would impose on state and local governments and the burdens and restrictions those increased costs would place upon state budgets, this Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, Cl. 3." *Id.* at 852.

Although the holding in *National League of Cities* was limited to the Tenth Amendment's limitation on the authority granted Congress under the Commerce Clause, this Court stated that it expressed no view as to whether different results might be obtained if Congress sought to affect integral operations of state governments by exercising authority granted it under another section of the Constitution, such as Section 5 of the Fourteenth Amendment. 426 U.S. at 852 n. 17.

Nonetheless, the Court of Appeals in this case has interpreted *National League of Cities* to mean that the "Tenth Amendment *only* limits laws passed pursuant to the Commerce

Clause." [Emphasis added in the original] 671 F.2d at 336. It ruled that since *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), "clearly holds that the Title VII amendments which extended the Act to state government employees were passed pursuant to Section 5 of the Fourteenth Amendment," 671 F.2d at 336, the Tenth Amendment was not applicable here. Petitioners submit that the issue whether the imposition of damages under a statute enacted pursuant to the Fourteenth Amendment is limited in any respect by the Tenth Amendment is an important one which should be settled by this Court.

Indeed, the award in the instant case displaces a non-discriminatory state legislative decision concerning the allocation of the state budget and is therefore inconsistent with the very basis of the federal system which the Constitution created. The exercise of power pursuant to the Fourteenth Amendment can infringe upon the concept of federalism embodied by the Tenth Amendment no less than the exercise of power under the Commerce Clause as in *National League of Cities*.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court held that the imposition of an award of damages against a state government pursuant to Title VII did not violate the Eleventh Amendment because the Eleventh Amendment, and the principle of state sovereignty which it embodies, were necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. *Id.* at 456. However, this is not a case as in *Fitzpatrick* where the state actually budgeted a retirement plan but then paid benefits thereunder in a discriminatory manner. In the instant case, funds were not budgeted in a discriminatory manner; indeed, they were not budgeted at all. Instead, the deferred compensation plan was directed to operate without any cost to the state. It was funded entirely by those funds which the state employees elected to defer.

While not every imposition of damages against a state is inconsistent with the Eleventh Amendment since the sovereign immunity embodied by that amendment can be waived,

Fitzpatrick v. Bitzer, supra, 427 U.S. 445, and not every imposition of damages against a state threatens the very basis of the federal system created by the Constitution, *see New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980), a court order, as in the instant case, which displaces a nondiscriminatory state legislative decision concerning the structure of the state budget is inconsistent with the very basis of the federal system which the Tenth Amendment embodies.

In *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981), this Court ruled that the inference that Congress intended to enact an affirmative obligation upon a state pursuant to Section 5 of the Fourteenth Amendment is weakest where "the rights asserted impose *affirmative* obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the states." *Id.* at 16-17. Hence, this Court has recognized that the imposition of affirmative obligations on a state pursuant to Section 5 of the Fourteenth Amendment can infringe on the federal system which the Constitution created.

Petitioners submit that this case raises the important issue of whether the imposition of damages under a statute (Title VII) enacted pursuant to the Fourteenth Amendment is limited in any respect by the Tenth Amendment. The lower court's order imposes an affirmative obligation on the State of Arizona to compensate females for the lower annuity benefits which they receive as a result of the practices of the insurance industry, whereas the plan in which the female employees enrolled was to be without cost to the state.

CONCLUSION

The Court of Appeals' opinion poses important and recurring questions of federal statutory and constitutional law relating to the reach of this Court's decision in *Manhart*, the imposition of liability under Title VII for limitations in the marketplace over which an employer has no control, and the relationship between the Tenth Amendment and the Fourteenth Amendment. For each and all these reasons, each within the scope of Supreme Court Rule 17.1, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Nathalie NORRIS, on behalf of herself and all others similarly situated, Appellee,

v.

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY And Deferred Compensation Plans, State of Arizona, and Richard Rabago; Margaret Griffith; Ted Williams; Russ Webb; Walter Madsen; Dave Conner and Jack La Sota, in their capacity as members of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, Appellants.

No. 80-5372.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 12, 1981

Decided March 11, 1982.

Appeal from the United States District Court for the District of Arizona.

Before GOODWIN and POOLE, Circuit Judges, and NIELSEN,* District Judge.

GOODWIN, Circuit Judge.

The Arizona Governing Committee ["Arizona"] appeals from a summary judgment in favor of the plaintiff and her class ["Norris"]. Relying on *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the court enjoined Arizona from using sex-segregated actuarial tables in its Deferred Compensation Plan and ordered that future annuity payments to female retirees equal the payments to similarly situated men.

* The Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

The summary judgment motions of plaintiff and defendant were argued on stipulated facts. A complete summary of the facts is found in the district court opinion. *Norris v. Arizona Governing Committee,* 486 F.Supp. 645, 647—48 (D.Ariz.1980). Basically, Arizona is authorized by Ariz.Rev.Stat.Ann. § 38—871 to investigate, approve and contract for tax deferred compensation and annuity programs for its employees. Norris' class, which was certified, consists of all female employees of Arizona who have enrolled in, or will enroll in, the plan.

The plan is offered to all employees on a voluntary basis. It is funded entirely by employee contributions. The employees are offered one of three options. First, an employee may elect the lump sum option. This option allows one to withdraw at once all of the accumulated annuity. Second, the employee may elect to receive a fixed sum for a fixed period of time. The third option—the life annuity contract—is the one in question here. The employee may elect to receive a certain amount of money each month for life. Arizona selects the companies with which the employee must contract. All the companies selected by Arizona use sex-segregated mortality tables in computing the monthly amounts due under the life annuity contract.[1]

Norris challenged the plan as violative of Title VII and the Fourteenth Amendment. The district court agreed that the plan violates Title VII. The court held that the plan does not violate

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[1] Essentially, the accumulated money is divided by the number of months which an average person of that sex would live. Because women, as a class, live longer, their monthly payments are smaller. *E.g.*

$$\frac{\text{Accumulated Annuity}}{\text{Life span after Retirement}} = \text{Yearly Payment}$$

$$\frac{\$1000}{10\text{ yrs}} = \$100/\text{yr (M)} \qquad \frac{\$1000}{20/\text{yrs}} = \$50/\text{yr (F)}$$

As Judge Solomon noted in *Henderson v. St. Of Or. By & Through Bur. of Labor,* 405 F.Supp. 1271 (D.Or.1975), in *Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), 84 per cent of women have the same life span as men, yet those 84 per cent received less money than their male counterparts. *Id.* at 1275 n.5.

the Fourteenth Amendment because the discrimination was not intentional. The court enjoined Arizona from using sex-segregated actuarial tables and ordered that future annuity payments to women equal the payments to similarly situated men. We affirm.

A. *Title VII Applies.*

The district court relied extensively on *Los Angeles Dept. of Water & Power v. Manhart, supra.* The pension plan in *Manhart* required female employees to make larger contributions to the fund than male employees. This pension plan was based on sex-segregated mortality tables and Los Angeles' experience that women live longer than men. The pension plan was funded by contributions from both the employees and Los Angeles. It was administered entirely by Los Angeles; no private insurance company was involved.

Manhart found this pension plan unlawful because Title VII forbids discrimination against any *individual* on the basis of sex. *Id.* at 708, 98 S.Ct. at 1375. The court recognized that the plan treated the class of women equal to the class of men (because the present value of the pensions of similarly situated males and females is the same, due to the greater longevity of women). It held, however, that an individual woman cannot be required to take home less pay than a similarly situated man because of stereotypical characteristics of the class of women, which she as an individual may not share.

Los Angeles argued that without the extra charge women employees, as a class, will be subsidized by male employees. The court rejected this argument because the question of fairness to a class is a question for the legislature. Congress, it said, has decided that classifications based on sex are unlawful. *Id.* at 709, 98 S.Ct. at 1376.

Los Angeles also argued that the Bennett Amendment authorized the differential.[2] The court rejected this argument because the pension did not reflect a differential "based on any other factor other than sex." Id. at 712–713, 98 S.Ct. at 1377–1378. The court rejected the argument that the differential was based on longevity because, although there are numerous factors which influence longevity (*e.g.*, weight, smoking, possibly race), Los Angeles relied only on the factor of sex.

The *Manhart* Court concluded its discussion of the validity of the plan by noting that Title VII did not intend to revolutionize the insurance and pension industries. It stated that the holding did not imply that an employer could not set aside equal retirement benefits for each employee and let the employee then purchase the best pension available on the open market.

In *Manhart,* the discriminatory pension plan was compulsory. Here, the plan is voluntary. An employee need not defer compensation. Instead, she may elect to receive her entire compensation each pay-day.

[1] A voluntary benefit offering tax savings is a "privilege" of employment and a "fringe benefit." Thus, this option of the plan is covered by Title VII even though Arizona does not require that each employee participate. *See Peters v. Wayne State University,* 476 F.Supp. 1343 (E.D.Mich. 1979) (Title VII applies even though employee participation is voluntary). Arizona has cited no law to the contrary.

Arizona and amicus American Council of Life Insurance argue that the McCarran-Ferguson Act [the Act], 15 U.S.C.

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[2] The Bennett Amendment allows differentiation based on sex if it is authorized by the Equal Pay Act. The Equal Pay Act allows employers to pay women different wages for equivalent work if it is a "differential based on any other factor other than sex." *Manhart,* 435 U.S. at 712, 98 S.Ct. at 1377.

§ 1011, *et seq.*, prohibits the application of Title VII in this situation. The Act states:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b).

Appellants argue (1) that the use of sex-based mortality tables involve the business of insurance; and (2) Arizona regulates the business of insurance (*see, e.g,* Ariz.Rev.Stat.Ann. § 20–448 prohibiting discrimination in rates). Therefore, Title VII may not be construed to prohibit employers from offering life annuity contracts from private insurers such as those condemned here by the district court.

[2] The fallacy in this argument is that the district court has not interfered with the business of insurance. Title VII has not been construed so as to supersede Arizona's laws. The court has not said that the companies may not use sex-segregated annuity tables. Nor has it joined the companies as defendants or required the companies to pay the adjusted annuities. All the court has done is tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man. As *Manhart* noted, Title VII says nothing about the situation in which a woman takes her money and chooses to purchase an annuity plan using sex-based tables. Title VII governs the relationship between employees and their employer, not between employees and third parties. *Manhart, supra,* 435 U.S. at 718, n.33, 98 S.Ct. at 1380, n.33. *But compare Women in City Govern. United v. City of New York,* 515 F.Supp. 295, 304–06 (S.D.N.Y.1981) (holding that Congress did not intend the McCarran-Ferguson Act to limit Congress' power to enact civil rights legislation that might affect the business of insurance) *with Spirt v. Tchrs. Ins. & Annuity Ass'n,* 475 F.Supp. 1298, 1304 (S.D.N.Y.1979) (hold-

ing application of Title VII to TIAA (a nonprofit legal reserve life insurance company) would supersede New York law, thus it's precluded by the McCarran-Ferguson Act).

B. *The Plan Violates Title VII.*

[3] Arizona argues that to satisfy Title VII Norris must prove that Arizona intended to discriminate against women. It argues that it did not intend to discriminate because it offered the plan in spite of, not because of, the actuarial difference for women.

The short answer to this argument is provided by *Manhart*. *Manhart* required no affirmative showing of intent. Nowhere was the need to prove intent discussed. Instead, the court focused on whether Title VII prohibited the differentials in the pension fund. *See e.g., Manhart* at 711, 98 S.Ct. at 1377: "[The pension] does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Accord Spirt, supra,* 475 F.Supp. at 1310 n.18.

Moreover, this circuit has held that facially discriminatory practices are intentional discrimination for the purposes of Title VII regardless of the subjective motivation. *See Krause v. Sacramento Inn,* 479 F.2d 988 (9th Cir. 1973); *Schaeffer v. San Diego Yellow Cabs, Inc.* 462 F.2d 1002, 1006 (9th Cir. 1972).

Thus, because on their face the practices in question treat men and women differently, Norris need not prove Arizona's animus in adopting the plan.

In *Manhart,* the plan required women to pay more than men into the retirement account. Thus, their take-home paycheck was smaller than similarly situated males. In this case, women who pay in equal amounts receive smaller annuity checks than similarly situated men. Every court that has considered the issue has refused to distinguish *Manhart* because

smaller benefits rather than greater contributions were involved.[3] Thus, this aspect of the plan is not a valid reason for distinguishing *Manhart*.

[4] Arizona also argues that *Manhart* is limited to employer-operated funds. It cites the following language: "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund." 435 U.S. at 717, 98 S.Ct. at 1380.

Other language in *Manhart* indicates that the opinion was not confined to employer-operated pension funds:

> "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718 n.33, 98 S.Ct. at 1380 n.33.

The reasoning of *Manhart* is no less persuasive where, instead of operating a plan itself, an employer designates certain companies to operate the plan. In both cases, the plan offered by the company discriminates against women because it looks at them as a class instead of as individuals.

In addition, none of the cases subsequent to *Manhart* has found Title VII inapplicable because an employer-operated pension plan was not involved. *See Equal Employment Opportunity Com'n v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters v. Wayne State University, supra; Spirt v. Tchrs. Ins. & Annuity Ass'n, supra.*

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[3] *Equal Employment Opportunity Com'n v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (equal mandatory pension contribution; women paid less); *Women in City Govern. United v. City of New York*, 515 F.Supp. 295, 298 (S.D.N.Y. 1981) (women pay in more; receive generally unequal monthly annuity or pension checks); *Shaw v. Inter. Ass'n of Machinists & Aerospace Workers*, 24 F.E.P. 995 (C.D.Cal.1980) (BNA) (equal mandatory contributions for joint and survivor annuities, smaller monthly payments); *Sobel v. Yeshiva University*, 477 F.Supp. 1161 (S.D.N.Y. 1979) (equal mandatory pension contributions; women paid less); *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D.Mich.1979) (mandatory retirement plan; women contributed equally but received less); *Henderson v. St. Of Or. By & Through Bur. of Labor*, 405 F.Supp. 1271 (D.Or.1975) (equal mandatory retirement contribution, smaller monthly payments to women).

Arizona attempts to distinguish these cases by stating that those employers took an active role in administering or developing the plan. This distinction is illusory. In this case, as in the above cases, it is clear that the adoption of the plan constitutes active participation without which the challenged program could not operate. *See Colby, supra,* 589 F.2d at 1141; *Sobel v. Yeshiva University,* 477 F.Supp. 1161, 1166 n.4 (S.D.N.Y.1979); *Spirt, supra,* 475 F.Supp. at 1308—09. Arizona made the selection of certain companies as funding media. It approved participation in the plan and deducted the appropriate amount from the employee's salary. The fact that the plan is operated by a private insurance company rather than Arizona does not render *Manhart* less controlling.

Arizona also argues that the district court erred in finding the plan discriminatory because the plan fell within *Manhart's* open market exception. After concluding that Los Angeles' pension plan was discriminatory, the *Manhart* court said:

> "All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market...." 435 U.S. at 717—18, 98 S.Ct. at 1380.

Arizona discusses two reasons why it thinks the plan falls within *Manhart's* open market exception. (1) The plan offers other nondiscriminatory options, and (2) the plan only reflects the limits which exist in the marketplace.

[5] Arizona argues that it provided Norris and her class with exactly what was referred to by the Supreme Court. They were given the option of taking their deferred compensation in a lump sum and buying the largest annuity they could find on

the open market. Arizona's amicus stated that simply providing a lump sum distribution option to each participant regardless of sex is equivalent to open market investment opportunities.

This argument is not well taken. The exception suggests that although an *employer* may not offer discriminatory benefits, it may offer equal benefits despite the fact that men and women cannot purchase equal goods with their equal benefits (as per *Manhart*, equal is defined with reference to the individual rather than with reference to the class of women). In other words, the open market exception in *Manhart* says the employer must not discriminate against women, but the employer is not responsible for discrimination against women by third parties.

In this case, it is undeniable that the lump sum option treats men and women the same. But Arizona has also offered a benefit which favors men. It has not merely offered a benefit which will purchase different amounts of goods from a third party. It has cited nothing that indicates that the availability of nondiscriminatory options legitimizes a discriminatory option.

[6] Arizona argues that the plan does not discriminate because it reflects the limits in the marketplace. It argues that the restriction is not of its own making. It cites *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *General Electric Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976); and *Geduldig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974).

This argument also misses the mark. Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context. In this case, Arizona overlooks the fact that it specifically adopted the discriminatory plan. Thus this case is not analogous to *Harris v. McRae* (abortion funding case) where the state refused to remove an obstacle to the woman's exercise of her right (*i.e.*, it did not take action to overcome the limits of the marketplace).

In this case, Arizona did not merely refuse to provide an annuity plan to women which treated them equally. It affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against women.

C. *The Propriety of the Award.*

Arizona argues that the district court award was improper. The order permanently enjoined "the defendants from carrying out their obligations under Ariz. Rev.Stat.Ann. § 38—871 *et seq.*, through the use of sex-segregated tables and directing that future annuity payments to female employees who have retired shall be equal to similarly situated male employees."

[7] Arizona argues that this order is an abuse of discretion for two reasons. First, relying on *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), it said that passive abusers, such as Arizona, should not pay. Second, it argues that the order is an abuse of discretion because Arizona taxpayers, through their legislators, indicated in Ariz.Rev.Stat.Ann. § 38—871 that they did not want to pay for the deferred compensation plan.

These arguments are without merit. First, *Manhart* and the cases construing it[4] have allowed recover in substantially similar circumstances. Second, the plaintiffs in *Chastang* recovered; the trustee who merely administered the plan chosen by the employer was not required to pay damages, although it was enjoined. Third, the fact that Arizona did not want to pay for the plan does not insulate it from making payments to equalize the treatment received by women. If this were not the case, a state could insulate itself from Title VII or § 1983 damages merely by saying it did not intend for its taxpayers to be burdened.

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[4] See cases cited in note 3 (excluding *Sobel* which sent the case to trial) and *Henderson* (which was decided before the Supreme Court's decision in *Manhart*).

[8] Arizona's Tenth Amendment arguments also lacks merit. Arizona argues: (1) that even though *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2nd 245 (1976), was limited to the Tenth Amendment's restriction on Congress' commerce power, it might apply to law passed pursuant to Section 5 of the Fourteenth Amendment; and (2) that Title VII was enacted pursuant to the Commerce Clause and thus *National League of Cities* applies. *National League of Cities* does not apply because the Tenth Amendment *only* limits laws passed pursuant to the Commerce Clause. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2nd 614 (1976), clearly holds that the Title VII amendments which extended the Act to state government employees were passed pursuant to Section 5 of the Fourteenth Amendment. The federalism argument cannot be used to prevent prospective damage awards for violation of federal law.

D. *Conclusion.*

Arizona's plan is unlawful under *Manhart*. Title VII applies to these fringe benefits which are offered to Arizona's employees on an optional basis. The existence of nondiscriminatory options does not legitimize the discriminatory option in the plan. This plan does not come within the open market exception in *Manhart* because Arizona did not offer equal benefits to men and women and let them purchase the best option they could on the open market. Finally, the award was proper. It did no more than was authorized by *Manhart*.

Accordingly, the decision is affirmed.

NIELSEN, District Judge, sitting by designation, dissenting:

I believe that Arizona's voluntary Deferred Compensation Plan falls clearly within the *Manhart* open market exception.

Nathalie NORRIS, on behalf of herself and all others similarly situated, Plaintiffs,

v.

ARIZONA GOVERNING COMMITTEE For Tax Deferred Annuity and Deferred Compensation Plans, State of Arizona and Richard Rabago, Margaret Griffeth, Ted Williams, Russ Webb, Walter Madsen, Dave Conner and Jack La Sota, in their capacity as members of the Governing Committee For Tax Deferred Annuity and Deferred Compensation Plans, Defendants.

No. CIV 78-341 PHX VAC.

United States District Court,
D. Arizona.

March 12, 1980.

OPINION

CORDOVA, District Judge.

The plaintiffs and defendants in this case presented to the Court cross motions for summary judgment upon an agreed statement of facts. The stipulated facts are admitted as true for the purpose of the respective motions for summary judgment.

NATURE OF THE CASE

The plaintiff, Nathalie Norris, requests that this case be certified as a class action and filed the same as a female employee of the State of Arizona challenging certain alleged discriminatory aspects of the Arizona Deferred Compensation

Plan ("Plan"). The Plan was adopted by the defendant Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans ("Governing Committee"). The action is filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff contends that because both sexes contribute an equal amount into a retirement account and upon retirement women receive lesser monthly annuity payments than men, that this constitutes discrimination based upon sex and is therefore contrary to the provisions of the Civil Rights Act.

The plaintiff seeks (1) to permanently enjoin the defendants from carrying out their obligations under A.R.S. § 38-871 *et seq.*, through the use of sex segregated actuarial tables, (2) that the Court direct annuity payments to female employees who have retired be made equal to similarly situated male employees, and (3) that this cause be certified as a class action pursuant to Rule 23(b)(2)(3), Federal Rules of Civil Procedure.

FACTS

The stipulated material facts are as follows:

The plaintiff Nathalie Norris is employed by the State of Arizona with the Department of Economic Security. She participates in the State's Deferred Compensation Program adopted by the defendant Governing Committee for tax deferred annuity and deferred compensation plans.

The plaintiff Governing Committee is authorized under A.R.S. § 38-871 to contract for the purposes of establishing tax deferred compensation and annuity programs for employees of the State of Arizona. The defendant State of Arizona is deemed an employer within the meaning of Section 701(b) of Title VII of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(b). The individual named defendants are members of the Governing Committee.

The parties agree that the plaintiff has exhausted her administrative remedies and that the Court has jurisdiction pursuant to 42 U.S.C. § 2000e—5(f) and 28 U.S.C. § 1343.

Pursuant to Rule 23(b)(2), F.R.C.P., the plaintiff's class is alleged to be all female employees who have chosen to enroll in or in the future will choose to enroll in the State Deferred Compensation Plan. The parties agree that as of August 18, 1978 there were 681 women employees of a total of 1,675 participating in the plan. Of the 681 women, 572 had elected some form of future annuity option. As of that same date, 10 women had retired and 4 had elected a lifetime annuity payout.

The Plan is described as follows:

In 1972, Arizona enacted the State Deferred Compensation Plan (A.R.S. § 38-871 *et seq.*). A.R.S. § 38-871 has been amended three times since its original enactment, but none of those amendments have any substantial effect on this litigation. On May 10, 1973, the Governing Committee promulgated rules and regulations which were amended in October of 1974.

The Plan is offered to all state employees on a voluntary basis. There is no employer contribution to the Plan. The benefits to the employee result from immediate tax savings and a promise by the State to ultimately pay the employee a sum of money based upon accumulated values of the employee's account. The Governing Committee made the selection of certain companies as funding media which included life insurance companies with annuity contracts.

One of the options open to the employee is that she may elect to receive a fixed sum for a fixed period of time. The parties agree that all funding media, except the Arizona State Employees Credit Union and the Keystone B4 Mutual Fund, will pay on direction by the Governing Committee a stipulated

periodic amount for a specified period of time. The amount or period of time would be determined by the then present worth of the employee's accumulations during the period of time he or she has been a member of the Plan, divided either by the periodic payment amount requested to determine the length of time such an amount would be paid, or the period requested to determine the amount. These payments would be the same for male or female, assuming all other factors are the same.

However, the parties further agree that for those persons who elect annuity options, the payouts are subject to mortality tables which are published in the contract with the particular company. These payments are calculated on the basis of the present worth of the person's account at the time payments are to begin divided by the months a person of that age and sex is expected to live, and factored by any guaranteed payment period. Because according to the annuity tables females as a class live longer than men as a class, the period of time for which payments are to be made to women would be longer than for men and thus, the periodic payment to women is less than for men. The amounts received are determined by the use of actuarial tables published by the particular company.

The plaintiff, on May 3, 1975, made application to the Governing Committee to participate under the Plan and requested that her monies be invested in Lincoln National Life Insurance Company's fixed annuity contract. Her application was approved on May 9, 1975 and she has been a participant in the Plan since that date. At the time she becomes eligible to receive benefits the options available to her would range from a lump sum payment to an annuity payment based upon the rates published by either the Lincoln National Life Insurance Company or any other funding account which would be in existence at that time.

Assuming the plaintiff does not increase or decrease the amount being deferred by her, and all things remaining equal, the total value of her account at age 65 would be $53,890.93, and the annuity payment that she would receive at that time

would be $320.11 per month for life, with 10 years certain. However, were the plaintiff a male, and assuming all other factors above remained the same, the payment would be $354.07 per month for life, with 10 years certain.

All of the companies participating in the State Deferred Compensation Plan use sex segregated actuarial tables. Although life expectancy is the rationale for using sex segregated mortality tables, other factors affecting longevity, such as smoking habits, alcohol consumption, weight, prior medical history and family history, are not specifically taken into consideration in determining the amount of monthly annuity to be paid. For example, a male who has smoked for 30 years is paid the same as a male who has never smoked. In compiling the mortality table upon which the annuity is based, males who smoked were included with males who never smoked.

DISCUSSION

The program in question is set forth in Article 5, Chapter 5, Title 38, A.R.S., and is labeled "Tax Deferred Annuity and Deferred Compensation Programs". The program is one which provides for deferred compensation and avoidance of income tax on present income.

The Plan is an employee benefit and the effect of participation is set forth in the statute as follows:

> "Any benefits provided pursuant to the provisions of this article shall be in addition to any other benefits provided by law for any employees of this state and shall be supplemental to the provisions of the state retirement system or plan provided pursuant to title 38, chapter 5, articles 2 and 2.1."
> (A.R.S. § 38–874 A)

Additionally, A.R.S. § 38–871 C(1), as amended, directs that any program adopted pursuant to the legislation be operated without cost or contribution from the State, and A.R.S. § 38–872 makes participation voluntary.

The plaintiff's contention is that the Plan is violative of Title VII of the Civil Rights Act.[1]

The use of sex segregated actuarial tables as applied to retirement plans has been held by the United States Supreme Court as violative of Title VII of the 1964 Civil Rights Act. In *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the employer adopted a retirement plan which provided for equal annuity payments for men and women upon retirement, but required larger contributions from women employees. This practice was held by the Supreme Court to be discriminatory and prohibited by the Civil Rights Act.

However, the question before this Court is distinguishable from *Manhart,* hence this Court must consider whether that distinction necessarily dictates a different result. In *Manhart,* it was a retirement plan which was being considered by the Court with mandatory participation by the employee and with females required to pay more into the fund than male employees in order to receive the same monthly payment at retirement. The plan now before this Court is a deferred compensation plan with voluntary participation, with females and males paying the same amount into the fund, and females receiving less in monthly annuity payments at retirement.

As retirement benefits are part of the compensation terms of an employee, and a privilege of employment, the Court must resolve whether a Deferred Compensation Plan is likewise a

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[1] The applicable portion of Title VII, Section 703(a)(1) provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin . . ." (42 U.S.C. § 2000e 2(a)(1))

benefit and a privilege of employment? If so, should the benefit and the privilege to the female employees and the male employees be the same? The Court concludes the answer to both questions to be in the affirmative.

[1, 2] Addressing the question of voluntariness of employee participation in a deferred compensation plan, discrimination against an employee because of sex is violative of Title VII of the 1974 Civil Rights Act whether the employee's participation is voluntary or mandatory, if the discrimination results or may result in a financial benefit, more advantageous conditions of employment, or better or additional privileges to the members of one sex and not the other. The Arizona law in Section 38–874 clearly designates the deferred compensation plan as a benefit in addition to any other benefits provided by law and supplemental to the provisions of the State Retirement System or Plan. The theory of deferred compensation is a clear financial benefit to the employees since it results in reduced taxes on present income. That part of the taxes which are not paid by the employee and result in a tax savings is a monetary saving to the employee. It is unrealistic and illogical to accept the proposition that because a female has the option not to participate that she is not being discriminated against. If she elects not to participate then she will of course not defer her compensation and will have to pay income taxes at the present rate on all her income. She will thereby forego her right to avoid a present tax on the deferred income and pay less tax some years hence when her income is in a reduced amount.

[3] Whereas, in *Manhart,* it was required that female employees make a larger contribution to the pension fund than male employees in order to receive the same monthly payments upon retirement, here both sexes making the same contributions into the deferred compensation plan and selecting the same annuity benefit program receive dissimilar monthly payments in that the female employee receives a lesser amount than the male employee. It is generally accepted that women, as a class, live longer than men. It is equally true that many women do

not live as long as the average man and many men outlive the average woman. The question before this Court, therefore, is the same question that was before the Court in *Manhart*. It is the existence or nonexistence of "discrimination" to be determined by comparison of class characteristics or individual characteristics? The Civil Rights Act makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin". 42 U.S.C. § 2000e—2(a)(1). It logically follows that if the Civil Rights Act is intended to be applied to individuals, then a generalization about a class even if true is an insufficient basis for disqualifying an individual to whom the generalization does not apply.

The defendants' response relies on dictum in *Manhart* wherein the Court stated:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market."

In the footnote the Court warned that Title VII primarily governs relations between employees and their employer, not between employees and third parties. The Court further stated that an employer could not avoid his responsibilities by delegating discriminatory programs to corporate shells. The Plan offered by the State of Arizona does not permit an employee to use his or her accumulated funds and purchase a retirement program in the "open market". To the contrary, the employee must select an option offered by one of the funding media approved by the State. The State Committee selects the funding media which makes the annuity payments. If the employee selects an annuity it is with one of the companies selected by the Committee. The funding media which have entered into the agreements with the State use sex-segregated actuarial tables.

[4] The fact that employees may select an option other than annuity payment, i.e., lump sum distribution, likewise has no bearing on the lawfulness of the plan. Most female employees select the annuity option. In this case, 572 out of 681 female employees so elected. The reason is that the income tax must be paid on the sums as they are withdrawn from that account, and it is to the employee's advantage to spread the tax liability over a number of years rather than paying taxes on the full accumulated amount in one lump sum.

The Indiana Supreme Court rejected the availability of options as a defense to an otherwise discriminatory plan. *Reilly v. Robertson,* 360 N.E.2d 171 (Ind.1977), cert. denied, 434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83 (1977).

> "We are not convinced that the existence of such options render the uneven distribution of benefits under 'A' options constitutionally permissible. From the record we know that 'A' options are selected by the vast majority of all annuitants and that 'B' options are not the functional equivalent of 'A' options."

Again, in *E.E.O.C. v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), the alleged discrimination was "that the ultimate monthly annuity payments to women were smaller than those made to their male counterparts". The Court in *Colby* addressed itself to the applicability of Title VII to a situation where females received smaller monthly annuity payments and found the same discrimination, stating:

> "If the statute's (Title VII) 'focus on the individual' forbids an employer from treating women as a class with respect to annuities so as to require from them higher premiums, . . . it is difficult to perceive a distinction that would permit a plan whereby women make contributions equal to those of men, but receive smaller monthly payments . . . ."

The plaintiff additionally contends that the Plan violates the equal protection clause of the Fourteenth Amendment. A.R.S. § 38—872 refers to state employees, makes no reference to sex, and is not gender-based.[2] Since the Arizona statute is gender-neutral on its face, the Court must then consider whether the classification itself, covert or overt, if not based upon gender results nevertheless in an adverse effect which reflects invidious gender-based discrimination.

[5, 6] It may be arguable that the use of actuarial tables by companies with whom Arizona has contracted constitutes gender-based discrimination violative of the equal protection clause. However, as was pointed out in *Personnel Administrator of Massachusetts v. Finney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), there must be a purposeful discrimination shown before the statute or the program would be found to be offensive to the equal protection clause. These defendants contracted with insurers to provide annuities to participating employees who chose an option, when entitled to benefits under the Plan, where the insurer pays less in monthly payments to females than similarly situated males. From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are the results of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment. The Court finds that it does not.

[7] The Court next considers whether this cause should be certified as a class action pursuant to Rule 23(b)(2), F.R.C.P. In order to certify an action as a class suit, the Court must find

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[2] "Section 38-872

A. State employees may participate in tax deferred annuity and deferred compensation programs established pursuant to the provisions of Section 38-871.

B. Participants in such plans shall authorize their employers in writing to make reduction or deductions in their remuneration as provided in an executed deferred compensation agreement.

that the prerequisites of Rule 23(a) have been met and that the action falls within the three categories of Rule 23(b). Rule 23(a) provides that one or more members of a class may sue or be sued on behalf of a class if:

". . .

1. [T]he class is so numerous that joinder of all members is impracticable;

2. there are questions of law or fact common to the class;

3. the claims of defenses of the representative parties are typical of the claims or defenses of the class; and

4. the representative parties will fairly and adequately protect the interest of the class."

The requirements of Rule 23(a) have been met from the facts stipulated to by the parties.

Rule 23(b)(2) provides that an action may be maintained as a class action where:

"[T]he part[ies] opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

It is clear from plaintiff's complaint and the stipulated facts of the parties that the defendants, "the party opposing the class", have acted or refused to act on grounds generally applicable to the class. In light of the claims of the class, injunctive relief is an appropriate remedy.

The plaintiff class shall consist of all female employees of the defendant State of Arizona who have enrolled in, or in the future will choose to enroll in the State of Arizona Deferred Compensation Plan pursuant to A.R.S. § 38—871 *et seq.*

CONCLUSION

[8, 9] Male and female employees must be treated equally by an employer. Any discrimination against a female employee in respect to compensation, conditions of employment, or privileges of employment solely because of her sex is a violation of Title VII, Section 703(a)(1) of the Equal Employment Opportunity Act of 1974. The administration of the Deferred Compensation Plan of the State of Arizona, which provides or permits smaller monthly annuity payments to a female employee than to a male employee contributing the same amount, is discriminatory and in violation of Title VII of the 1964 Civil Rights Act.

Pursuant to the provisions of Rule 23, Federal Rules of Civil Procedure, this cause may be maintained as a class action. The plaintiff, Nathalie Norris, on behalf of herself and for the class, is entitled to a summary judgment permanently enjoining the defendants from carrying out their obligations under A.R.S. § 38—871 *et seq.*, through the use of sex segregated actuarial tables, and for an order directing that annuity payments to female employees who have retired shall be equal to similarly situated male employees.

§ 38-871. Annuity and deferred compensation governing committee; members; duties

Text as amended by Laws 1973, Ch. 157, § 48.

A. There is established a governing committee for tax deferred annuity and deferred compensation plans which shall consist of the following seven members:

1. Three employees of the state appointed by the governor.

2. The director of the state personnel commission.

3. The superintendent of the state banking department.

4. The assistant director of the department of administration for the division of finance.

5. The attorney general.

B. The governing committee may:

1. Investigate and approve tax deferred compensation and annuity programs which give employees of the state income tax benefits authorized by title 26, United States Code Annotated.

2. In carrying out the purposes of this article, enter into agreements with life insurance companies authorized to do business in this state and with bank trustees or custodians and investment counseling firms registered with the securities exchange commission.

C. The governing committee shall:

1. Arrange for consolidated billing and efficient administrative services in order that any such plans approved shall operate without cost or contribution from the state except for the incidental expense of administering the payroll salary deduction or reduction and remittance thereof to the trustee or custodian of the plan or plans.

2. Promulgate rules and regulations governing the solicitation of employees by persons offering tax deferred compensation or annuity plans to such employees.

§ 38-872. Voluntary participation; authorization

A. State employees may participate in tax deferred annuity and deferred compensation programs established pursuant to the provisions of § 38-871.

B. Participants in such plans shall authorize their employers in writing to make reductions or deductions in their remuneration as provided in an executed deferred compensation agreement.

§ 38-873. Payroll salary deductions; division of finance

The department of administration division of finance shall initiate payroll salary reductions or deductions for the plans adopted pursuant to § 38-871 as directed by each employee participating in such plans.

§ 38-874. Effect of participation

A. Any benefits provided pursuant to the provisions of this article shall be in addition to any other benefits provided by law for any employees of this state and shall be supplemental to the provisions of the state retirement system or plan provided pursuant to title 38, chapter 5, articles 2 and 2.1.

B. Any income deferred under a plan established pursuant to this article shall be included as regular compensation for the purpose of computing the retirement and pension benefits earned by any employee participating in such plan.

No. 82-52

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 12, 1982
CERTIORARI GRANTED OCTOBER 12, 1982

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RELEVANT DOCKET ENTRIES

Docket Entries from the District Court

Date	Filings—Proceedings
April 25, 1978	Complaint
May 22, 1978	Answer
June 7, 1979	Joint Stipulated Statement of Facts
August 31, 1979	Plaintiff's Motion for Summary Judgment
August 31, 1979	Defendants' Motion for Summary Judgment
September 28, 1979	Plaintiff's Memorandum in Response to Defendants' Motion for Summary Judgment
September 28, 1979	Defendants' Reply to Plaintiff's Motion for Summary Judgment
October 22, 1979	Hearing on Motions for Summary Judgment
March 13, 1980	Order certifying the cause as a class action, granting summary judgment in favor of plaintiff and denying defendants' motion for summary judgment
March 13, 1980	Opinion and Judgment of District Court
March 24, 1980	Plaintiff's Motion to Amend Judgment
March 24, 1980	Defendants' Motion to Amend Findings of Fact and Conclusions and for Relief from Judgment
March 24, 1980	Bill of Costs
April 3, 1980	Defendants' Response in Opposition to Plaintiff's Motion to Amend Judgment
April 3, 1980	Plaintiff's Memorandum in Response to Motion to Amend Findings and Conclusions and for Relief from Judgment
April 9, 1980	Plaintiff's Reply Memorandum in Support of the Motion to Amend Judgment

Date	Filings—Proceedings
April 14, 1980	Order denying plaintiff's Motion to have Court's opinion and judgment apply retroactively, granting plaintiff's motion for attorney's fees, denying defendant's Motion to Amend Findings of Fact and Conclusions of Law and For Relief from Judgment
May 14, 1980	Defendants' Notice of Appeal
May 19, 1980	First Amended Judgment

Docket Entries from the Court of Appeals

January 16, 1981	Appellants' Opening Brief
April 7, 1981	Appellee's Brief
August 12, 1981	Oral argument
March 11, 1982	Opinion of Court of Appeals and Judgment entered
April 5, 1982	Mandate Issued by Court of Appeals
June 29, 1982	Order of Court of Appeals awarding appellee's attorney's fees in the amount of $8,027.50

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit in *Norris v. Arizona Governing Committee for Tax Deferred Annuity* is officially reported at 671 F.2d 330 (9th Cir. 1982) and is set forth in Appendix A of the Petition for Writ of Certiorari.

The opinion of the United States District Court for the District of Arizona in *Norris v. Arizona Governing Committee for Tax Deferred Annuity* is officially reported at 486 F. Supp. 645 (D. Ariz. 1980) and is set forth in Appendix B of the Petition for Writ of Certiorari.

JOINT STIPULATED STATEMENT OF FACTS

In the United States District Court
For the District of Arizona

(Title of Case Omitted in Printing)

Plaintiff and defendants present herewith a joint stipulated statement of facts, along with exhibits, which they agree may be considered in connection with cross motions for summary judgment to be filed in accordance with the parties' stipulation dated June 1, 1979. The facts stated are admitted as true by the parties only for purposes of their respective motions for summary judgment. While admitting the truth of all facts stated, each party reserves the right to contest the materiality or relevance of any fact.

In order to avoid setting forth lengthy provisions from various documents, the parties have agreed to attach those documents in their entirety. Other exhibits such as rules are also attached. To the extent that there may be a variation between the characterization of the exhibits and the exhibits themselves, the actual exhibit prevails.

DATED this 8th day of June, 1979.

ROBERT K. CORBIN
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By: _____

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STIPULATED STATEMENT OF FACTS

I. The Parties

A. Plaintiff

Plaintiff Nathalie Norris is a resident of Maricopa County, Arizona. She is now and has been employed by the State of Arizona in the Department of Economic Security. She participates in the State's Deferred Compensation Program adopted by the defendant Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans. She is enrolled in the plan approved by the defendant.

B. Defendant

Defendant Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans (Committee) is authorized under A.R.S. § 38-871 to contract for the purpose of establishing tax-deferred compensation and annuity programs for employees of the State of Arizona. For the purposes of this action, defendant State of Arizona shall be deemed to be an employer within the meaning of § 701(b) of Title VII of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(b). Defendants Richard Rabago, Ron Walker, Ted Williams, Walter Madsen, Dave Conner, Russ Webb, and Robert Corbin are present members of the Governing Committee. Prior Committee members adopted the program which is the subject of the complaint.

II. Jurisdictional Prerequisites

Plaintiff has exhausted her administrative remedies. Charges were filed with the Equal Employment Opportunity Commission on May 5, 1975, and were deferred to the Arizona Civil Rights Division, Department of Law, on June 19, 1975. The Equal Employment Opportunity Commission assumed jurisdiction on August 19, 1975, and Plaintiff received Notice of

Right to Sue from the United States Department of Justice on February 14, 1978. This action was filed on April 25, 1978.

The jurisdiction of the Court is invoked pursuant to 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343. This action arose in Maricopa County, Arizona.

III. Description of the Class

This action has been brought pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of the Plaintiff and on behalf of all female employees who have chosen to enroll in or in the future will choose to enroll in the State Deferred Compensation Plan. As of August 18, 1978, there were 1,675 employees participating in the plan, of whom 681 were women. Of these 681 women, 572 had elected some form of future annuity option. As of the same date, ten women had retired, with four electing a life-time annuity payout.

IV. Description of the Plan

In 1972 the State of Arizona Legislature enacted A.R.S. §§ 38-871 through 38-874. A.R.S. § 38-871 has been amended three times since the original enactment, but none of those amendments has any substantial effect on this litigation. Shortly after the original law became effective, the Governing Committee promulgated rules and regulations which became effective on May 10, 1973. These rules were amended in October, 1974, and the amended version of the rules is attached hereto as Exhibit 1. The joinder agreement completed by the Plaintiff when she joined the plan is attached as Exhibit 2.

The plan is offered to all state employees (about 35,000, approximately 10,000 of whom are university personnel) on a voluntary basis. There is no employer contribution to the plan (except for the support services needed to effect payroll deduc-

tions and employer sanctioned time off to employees to attend group meetings). The benefits which flow from this plan result in immediate tax savings to a participant and a promise by the state to ultimately pay the participating employee a sum of money based upon accumulated values of the employee's account, the exact amount of which will vary in accordance with elections requested by the employee and approved by the state. These options are more fully explained later or in the plan. These benefits most frequently will occur when the employee retires, but may be paid at other times.

After receipt of a favorable letter of determination by the Internal Revenue Service in 1974, the Committee began the process of selecting prospective funding media into which investment of monies deferred by employees could be directed in order for the State of Arizona to be able to meet contingent future liabilities which were to be created by the implementation of the plan. Also in connection with this selection process, a booklet was prepared to aid the marketing of the deferred compensation plan. As a result of the selection process, the defendant Committee selected the following companies to act as funding media:

1. Lincoln National Life Insurance Company (Lincoln or Lincoln National)—The funding vehicle selected by the Committee was a fixed and variable annuity contract. A copy of this contract as issued to the Committee is attached as Exhibit 3.

2. National Investors Life Insurance Company (National Investors)—A fixed annuity contract attached as Exhibit 4.

3. A savings account with the Valley National Bank of Arizona, N.A.—This savings account was a regular passbook savings account. (Valley National Bank was also selected as the custodian bank for the handling of monies deferred by employees and being transferred to the various funding media).

In a subsequent year the Variable Annuity Life Insurance Company (VALIC) and the Hartford Insurance Company (Hartford) were admitted as funding media to offer both fixed and variable annuity to plan participants. The VALIC contract is attached as Exhibit 5 and the Hartford contract is attached herein as Exhibit 6.

In 1977 the ITT Life Insurance Corporation, which offers a life insurance policy connected with an annuity payout option, was added. A specimen copy of insurance contracts which are issued on the life of any individual who selects this funding media is attached as Exhibit 7, together with a blank application form and a completed application form, for exemplary purposes only. Keystone B4 Mutual Fund (Keystone) was also admitted at that time. No specific document was issued to the Committee for persons who choose this option except a prospectus is given to each person selecting the option and this is attached as Exhibit 8. The joinder agreement completed by the person who is enrolling in the plan and similar to the one which has been referred to above as Exhibit 2 is the application for participation in this particular funding media. Keystone does not have an annuity feature connected with any payout option available under the program.

Lincoln, VALIC and Hartford declined to participate in future enrollments of participants in the plan of 1977 when all funding media were required by the Committee to re-bid. However, all persons who had previously chosen to have monies deferred placed pursuant to the contracts issued by those companies were allowed to continue in that media for all past contributions and as to all future contributions if desired. There are no plans to change this arrangement.

In 1976, the Arizona State Employees Credit Union was admitted as a funding media and Valley National Bank resigned shortly thereafter as a funding media because they could not meet the interest credits paid by the Credit Union. Monies previously deferred to the Valley National Bank were

transferred to Arizona State Employees Credit Union. A copy of the account card issued by the Credit Union upon application by the Committee chairman is attached as Exhibit 9.

Neither the Keystone nor the Credit Union have the ability or the authority to offer or pay monies for the life of a person. The only payouts possible from these two funding media are a lump sum or a periodic payment for a definite period of time selected by the employee and approved by the Committee, neither of which are subject to standard mortality tables. However, it would be possible for an employee to request the Committee to transfer all funds accumulated in the Credit Union or mutual fund account and purchase a single premium life annuity contract on that employee's behalf with those monies. However, an annuity purchased in this manner would be subject to mortality tables which are then in effect with the National Investors Life Insurance Company policy, since all other funding media who had offered annuities are not currently funding medias into which the State of Arizona Deferred Compensation Committee would invest monies to be paid out to such employees. However, the contracts described above with the various insurance companies, which are represented by those policies attached as Exhibits 3, 4, 5, 6 and 7 still are in existence with the Committee and will be maintained indefinitely into the future and benefits ultimately paid from them in any manner permitted by the contract if the participating employees so elect and the Committee approves such elections, except as provided in paragraph 5.01 of the plan.

All funding media, except the Credit Union and Keystone provide in the contract and will pay, on direction by the Committee, a stipulated periodic amount for a specified period of time, which amount or time period would be determined by the then present worth of the person's accumulations during the period of time he had been a member of the plan, divided either by the periodic payment amount requested to determine the length of time such an amount would be paid or the period requested to determine the amount. These payments would be

the same for male or female, assuming all other factors are the same.

However, for those persons who elect annuity options, the payouts are subject to mortality tables which are published in the contract with the particular company. These payments are calculated on the basis of the present worth of the person's account at the time payments are to begin divided by the number of months a person of that age and sex is expected to live and factored by any guaranteed payment period. Because females as a class live longer than men as a class, the period of time for which payments are to be made to women as a class would be longer than for men as a class and thus the periodic payment to women is less than for men. The amounts received are determined by the use of actuarial tables published by the particular company. All tables presently in use provide a larger sum to a male than to a female of equal age, account value and any guaranteed payment period. Many women do not live as long as the average man and many men outlive the average woman.

After original selection of the funding media, a booklet was prepared which described the plan by means of a question and answer format and included a copy of the plan therein. A copy of this original booklet is attached as Exhibit 10. Subsequently, upon the addition of the other funding media described above in subsequent enrollment years, this booklet was revised and a copy of the revised booklet is attached as Exhibit 11. Both also contain a verbatim reprint of the plan.

On April 19, 1979, the Committee voted to change its fixed annuity contract from Lincoln National's Group Fund B to Group Fund A. Lincoln National has not issued its policy to the Committee and no copy of this contract is presently available, but it is believed identical with the one attached hereto as Exhibit 3, except the currently credited rate of interest is 8.15% instead of 7½%.

Parenthetically, it is noted the Committee is considering amendments to the plan, its rules and the joinder agreement. These changes are due primarily to the enactment of the Federal Revenue Act of 1978, Public Law 95-600. None of these changes have occurred and it is not known if any in fact will occur before this Court enters its judgment. However, if changes are made, it is agreed this stipulation may be supplemented at that time if the Court deems the changes appropriate or necessary for a proper decision in this case.

V. Plaintiff Nathalie Norris

On May 3, 1975, the Plaintiff made application to the Committee to become a participant under the plan and requested that the monies being deferred be invested in the Lincoln National Life Insurance Company's fixed annuity contract. This application was approved by the Committee on May 9, 1975. The Plaintiff has been since that time a participant in the plan and has made no changes in her original joinder application.

The Plaintiff is deferring $199.50 per month into the plan, for which the state has made a promise to pay her monies at a particular time in the future in accordance with her joinder agreement and the plan. In accordance with this promise, the monies being deferred are in fact being invested with the Lincoln National Life Insurance Company's fixed account. At the time she becomes eligible to receive benefits under paragraph 5 of the plan, she can make an entirely different election as to what benefits she would like to receive. The benefits would be calculated on the basis of the accumulated cash value of all monies deferred by her together with any earnings thereon. Options which would be available to her would range from a lump sum payment of that current amount to an annuity payment based upon the rates published by either the Lincoln National or any other funding account which would be in existence at that time.

Assuming that the plaintiff does not increase or decrease the amount which is being deferred by her and that the unit value of her investment is the same today as it is when she becomes eligible to make her election under paragraph 5 and assuming that she elects the same method of payout as she did in her original joinder agreement and further assuming that she made this election at age 65 (this also assumes interest of 7½% per year being currently credited, but which is not guaranteed), the total value of her account at age 65 would be $53,890.93 and the annuity payment that she would receive at that time would be $320.11 per month for life, with ten years certain. However, were the plaintiff a male and assuming that all other factors above to be the same, the payment would be $354.06 per month for life, with 10 years certain.

VI. Actuarial Tables

In determining the monthly payments for individuals who have chosen a lifetime annuity option, all of the companies participating in the State Deferred Compensation Plan use sex segregated actuarial tables. One of the more common ones used is the 1971 Group Annuity Mortality Table. For example, National Investor uses the annuity table based on male mortality tables exclusively with a six year "setback" for females. "Setback" as used here means the real age of a female is reduced six years. Thus a 65 year old woman is treated as being 59 years old and her monthly annuity based on that age, while a 65 year old male has his monthly annuity based on age 65. Lincoln National on the other hand uses no "setback", but rather has separate tables for males and females. Whatever the table used, the result is the same for all lifetime annuity payouts—a female employee, upon retirement, will receive a smaller monthly payment than would a male retiree who had contributed equal amounts as the female, on the expectation that the female's payments will be spread out over a longer

period of time. However, if the same persons chose any payout other than a lifetime annuity, such as a lump sum, they would receive exactly the same amount. Although life expectancy is the rationale for using sex-segregated mortality tables, other factors affecting longevity, such as smoking habits, alcohol consumption, weight, prior medical history and family history are not specifically taken into consideration in determinating the amount of monthly annuity to be paid. For example, a male who has smoked for thirty years is paid the same as a male who has never smoked. However, in compiling the mortality table upon which the annuity is based, males who smoked were included with males who never smoked.

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Appellee,

vs.

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, et al.,

Appellants.

No. 80-5372

DC CV 78-341 VAC

APPEAL from the United States District Court for the ..... District of ARIZONA (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of ARIZONA (Phoenix), and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the .... judgment of the said District Court in this Cause be, and hereby is affirmed.

cc:
9th CCA
Court Reporter
Federal Defender
US Attorney
US Magistrate
Marshal
Probation
Counsel _____

_____
$70 Fees Paid
Judge/CTRM Deputy

A TRUE COPY
ATTEST APR 5 - 1982
PHILLIP B. WINBERRY
Clerk of Court

by: _____
Deputy Clerk

Filed and entered March 11, 1982.

Office - Supreme Court, U.S.
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SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-52

In The

Supreme Court of the United States

October Term 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 82-52

In The

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COUNTERSTATEMENT OF THE CASE

From the outset, petitioners grossly misrepresent one of the stipulated facts here as they did in the court below. The entire Petition is predicated on the stipulation that "all of the insurance companies which were available to Arizona to provide life annuities used . . . sex-based mortality tables." Petition for Writ of Certiorari at 3. This alleged "fact" is repeated throughout the Petition in a variety of forms. *Id.* at 8, 9, 11, 12, 14, 15, 17, 20, 21. In truth, however, the parties stipulated only that all companies *designated by the Arizona Governing Committee* as funding media use gender-based actuarial tables. *Id.* at A-16; Joint Stipulated Statement of Facts at pp. 8, 10. The record is totally silent on efforts made by the state to negotiate with the selected insurance companies, or any other companies, for non-discriminatory provisions.

The opinion of the district court correctly summarizes the facts to which the parties stipulated. Petition for Writ of Certiorari at A-13 to A-16.

SUMMARY OF ARGUMENT

In *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), this Court held that retirement or pension plans which classify women on the basis of sex rather than individual characteristics are impermissible under Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. § 2000e (Title VII).

Manhart involved an employer-operated pension plan which required unequal contributions from men and women; this case involves a pension plan offered by an employer with unequal payments to men and women. Both plans discriminate against women as a class; both plans treat women differently

from men solely on the basis of their sex. The decisions of the Ninth Circuit Court of Appeals and the district court are fully faithful to *Manhart*. The decisions do nothing more than apply *Manhart* to a discriminatory plan which an employer selects and makes available to its employees. Because the fundamental issue in this case has previously been resolved by this Court, and because there is no inconsistency or confusion in any of the lower courts, the Petition for Certiorari should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE HOLDING IN *MANHART*.

A. *The Holding of the Court of Appeals is Consistent with* Manhart.

This Court has held that a pension plan requiring women to make greater payments than men in order to receive the same monthly benefits is an express violation of Title VII. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). This case presents a logical application of *Manhart*.

Petitioners struggle to demonstrate that there is confusion and inconsistency among the lower courts. This is simply not true. Under *Manhart*, lower courts have repeatedly struck down defined contribution plans which require male and female employees to make equal contributions but pay to women smaller annuities than to men. *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Hannahs v. New York State Teachers' Retirement System*, 26 Empl. Prac. Dec. ¶ 32,037, 26 Fair Empl. Prac. Cas. 527 (S.D.N.Y. 1981); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *appeal pending*, Nos. 79-1670, -1671 (6th Cir. argued

April 7, 1981); *Spirt v. Teachers Insurance and Annuity Association*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *appeal pending*, No. 79-7715 (2d Cir.). These courts have also held unequivocally that retirement or pension programs which differentiate women as a class from men as a class violate Title VII under *Manhart*. *See also Retired Public Employees' Association v. California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. August 14, 1982) (No. 82-262); *Probe v. State Teachers' Retirement System*, 27 Fair Empl. Prac. Cas. 1306 (C.D. Cal. 1981), Nos. 81-5865, -5866 (9th Cir. argued July 7, 1982); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Shaw v. International Association of Machinists and Aerospace Workers*, 24 Fair Empl. Prac. Cas. 995 (C.D. Cal. 1980).

Petitioners' argument that the existence of nondiscriminatory options validates this otherwise unlawful plan is equally unsupported by the case law.[1] *Shaw v. International Association of Machinists and Aerospace Workers*, 24 Fair Empl. Prac. Cas. at 997; *Reilly v. Robertson*, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977). Further, no court has upheld a discriminatory retirement or pension plan simply because it is optional and not mandatory as in *Manhart*. *Cf. Peters v. Wayne State University*, 476 F. Supp. at 1347.

The claim of petitioners and amicus curiae American Council of Life Insurance that the application of *Manhart* to the present case would "revolutionize the insurance industry" is

[1]This is akin to arguing that a white-only cafeteria in an office building would be defensible if the employer also maintained a desegregated cafeteria on the premises. See note 4 *infra*, p. 5.

also unfounded.[2] Respondents are challenging discriminatory employment practices, not discrimination suffered in the insurance industry. The relief granted extends only to the State of Arizona as an employer, not to "wholly independent third-party insurers . . . ." Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition at 12.

The decision of the court of appeals is not inconsistent with *Manhart* because it imposes laibility on an employer that contracts with private insurance companies. To the contrary, this Court specifically addressed that issue in *Manhart*, when it cautioned: "We do not suggest, of course, that an employer can avoid his responsibilities by delegating discriminatory programs to corporate shells." 435 U.S. at 718 n.33. Courts have since held employers liable where the annuity option in a plan is administered by private insurance companies using sex-segregated actuarial tables. *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979).[3]

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[2]The doomsday cries contained in the Council's brief are the very same cries expressed in its amicus brief in *Manhart:* "The majority decision below, if sustained by this Court . . . could indirectly impose on the insurance industry a new federal actuarial rule requiring the utilization of 'unisex' actuarial tables. This would seriously disrupt the life insurance and pension industry in the United States . . . ." Brief of Amicus Curiae American Council of Life Insurance on Behalf of Petitioners in *City of Los Angeles, Department of Water and Power v. Manhart* at 3.

[3]Petitioners attempt to distinguish these cases on the basis that employers took an active role in administering or developing the allegedly discriminatory annuity program while in this case the State of Arizona did not. The court of appeals correctly found this distinction to be "illusory." Arizona selected the funding media for the plan, it approved participation in the plan and it deducted the appropriate amount from the employee's salary. The plan could not exist but for the action of the State of Arizona.

Finally, petitioners argue here, as they did below, that a showing of discriminatory intent is required. However, no affirmative showing of intent was required in *Manhart*. Petitioners' attempt to distinguish *Manhart* from this case on the basis that *Manhart* involved an employer-operated plan is a distinction without a difference. In this case petitioners adopted a plan which provides lesser benefits to women than to men; in *Manhart* the employer established a plan which required women to pay in more than men. Both plans were adopted by the employer. There is no legal basis to argue that an employer is relieved of liability under Title VII because someone else drafted the plan which it adopted.[4]

Furthermore, all of the cases cited by petitioner requiring proof of discriminatory motive are cases in which disparate treatment has been alleged. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). It is well established that in cases involving facially neutral policies, the test is disparate impact, not intent. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

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[4]For example, the state could provide a meal service through a food contractor which would serve employees in a cafeteria located in the office building. The employer has no involvement except to select one food contractor who does all of the meal preparation and service. Meals are optional and employees are free to eat outside the building or bring their lunch. None of these factors could render the meal service lawful under Title VII if separate eating facilities, separate lines, and separate menus were maintained for blacks and whites. However, under petitioners' argument, this food service would have to be permissible because (1) it is voluntary; (2) other nondiscriminatory options exist; (3) the food contractor, not the employer, designed the discriminatory meal program; and (4) to invalidate the service might adversely affect the industry.

The court of appeals faithfully applied this Court's holding in *Manhart* to the present situation, where monthly payments under the state's annuity option are less for women than for men. Its opinion is not inconsistent with the decisions of this Court or any other court.

B. *This Plan Does Not Fall Within the Open Market Exception Discussed in* Manhart.

Petitioners argue that this case falls under the so-called "open market exception" in *Manhart* for two reasons. First, they assert that the life annuities offered "fully represent those available on the open market," a fact which is nowhere in the record. Furthermore, as the court of appeals correctly stated, "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330, 335 (9th Cir. 1982).[5]

In *Manhart* this Court stated that employers could "set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18. This option allows an employer to give money to an employee for him or her to purchase *any*

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[5] Petitioners' reliance on *Harris v. McRae*, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980), and *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *reh'g denied*, 429 U.S. 1079 (1977), to support their contention that a defendant will not be held liable for discrimination against women for conditions not created by the defendant is misplaced. *Gilbert* was distinguished from the present situation in *Manhart*. ("[T]he General Electric plan did not involve 'discrimination based upon gender as such' . . . [but] on the basis of a special physical disability." 435 U.S. at 715.) In *Harris* the state refused to remove an obstacle which prevented women from exercising their right to abortion. Petitioners, on the other hand, affirmatively adopted a plan which discriminates against women.

insurance he or she can buy. That situation is totally distinct from the present case where the employer has contracted to make several policies with prescribed options available to an employee to the exclusion of any other policies on the market. Employees participating in this plan who desire the annuity option have no choice but to select a discriminatory benefit.

Petitioners' second argument, that the plan falls within the open market exception because it provides a lump-sum payment option, also misinterprets the operative language. *Manhart* did not hold that providing employees with the opportunity to purchase benefits on the open market legitimates other discriminatory options. No case supports this conclusion. The discriminatory annuity option is exactly what is proscribed under *Manhart*.

II. THE RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER.

The district court permanently enjoined petitioners from carrying out their obligations through the use of sex-segregated actuarial tables, and directed that *future* annuity payments to retired females equal those of similarly situated males. The relief awarded is well within the broad equitable powers Congress has granted to district courts in Title VII cases. 42 U.S.C. § 2000e-5(g).

Petitioners' attempt to gain review of the relief granted under a tenth amendment theory lacks merit. *National League of Cities v. Usery*, 426 U.S. 833 (1976), upon which petitioners rely, dealt with a conflict between the tenth amendment and Congress' power to override state sovereignty under the commerce clause. As the court of appeals noted, the holding in *National League of Cities* was specifically limited to the

commerce clause. *Norris*, 671 F.2d at 336.

In contrast, Title VII was extended to public employers pursuant to section 5 of the fourteenth amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The relationship between the fourteenth amendment and the tenth amendment which petitioners urge was unequivocally resolved in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), where this Court held that the tenth amendment is not a bar to a monetary award against a state in Title VII cases.

CONCLUSION

Under the deferred compensation plan designed by the State of Arizona, women receive smaller monthly payments under the annuity option than similarly situated men. The court of appeals correctly found this to be a violation of Title VII under *Manhart*. The prospective relief granted by the district court was, therefore, proper. Because all the issues presented by the petitioners have previously been decided by this Court, the Petition for Certiorari should be denied.

Respectfully submitted this 3d day of September, 1982.

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No. 82-52

IN THE

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OCTOBER TERM, 1982

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Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners submit this reply brief pursuant to Rule 24.5 of the Rules of the Supreme Court to address an argument first raised by respondents in opposition to the petition for a writ of certiorari.

Respondents claim that "[t]he entire Petition is predicated on the stipulation that 'all of the insurance companies which were available to Arizona to provide life annuities used . . . sex-based mortality tables'" but that "[i]n truth . . . the parties stipulated only that all companies *designated by the Arizona Governing Committee* as funding media use gender-based actuarial tables."

Respondents' statement is incorrect. To the contrary, the Joint Stipulated Statement of Facts, upon which the judgments below were based, stated without qualification:

> "All [actuarial] tables presently in use provide a larger sum to a male than to a female of equal age, account value and any guaranteed payment period."

Joint Stipulated Statement of Facts, p. 8

Indeed, respondents' counsel at the hearing on the motions for summary judgment in the district court admitted that he was unaware of any insurance company which did not use sex-based actuarial tables:

> "MR. MEYERSON: I do not know whether in the State of Arizona there is a carrier who is prepared to offer a plan that would be required if the Court would rule in favor of plaintiff's motion."

October 22, 1979 hearing, p. 11[1]

Moreover, it was respondents who had the burden of proof to demonstrate that petitioners could have contracted with an insurance company that used unisex mortality tables. *See Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981). Since respondents failed to identify even one such company (and indeed none exists), they cannot now claim that petitioners could have acted otherwise than they did. Petitioners had no choice but to offer life annuities based on sex-based actuarial tables, if they were to offer them at all.

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[1] Indeed, the amicus brief of the American Council of Life Insurance ("ACLI"), submitted to the Ninth Circuit, stated that it knew "of no private insurance company offering annuities to the general public and doing business in Arizona, or anywhere else, either today or in 1972 . . . that offers an annuity which does not calculate benefits in accordance with sex-based actuarial tables." (ACLI brief, p. 22 n. 32) *See Equal Employment Opportunity Commission* v. *Colby College,* 589 F.2d 1139, 1145 (1st Cir. 1978).

In any event, our "entire" petition was not "predicated" on our reading of the stipulation on that one fact. The court of appeals' opinion poses other important questions relating to the reach of the Court's decision in *Manhart* which this Court should settle: The extension of *Manhart* to impose liability on an employer for the practices of private insurance companies, the application of *Manhart's* open market exception, whether proof of intent to discriminate is necessary, and the relationship between the Tenth Amendment and the Fourteenth Amendment. Petitioners therefore request that a writ of certiorari be issued to review the judgment and opinion of the Ninth Circuit.[2]

Respectfully submitted,

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[2] Petitioners do not believe it is appropriate to address the other misrepresentations in respondents' brief pursuant to Supreme Court Rule 24.5. However, one misrepresentation of the law is so egregious that petitioners cannot overlook it. The decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), only held that an imposition against a *private* company of attorneys' fees which are not authorized under state procedure does not violate the Tenth Amendment where authorized pursuant to congressional power under Section 5 of the Fourteenth Amendment; it did not "unequivocally" resolve the relationship between the Fourteenth and Tenth Amendments, as respondents urge at p. 8 of their brief.

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NATHALIE NORRIS, on behalf of herself and
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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IN THE

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v.

NATHALIE NORRIS, on behalf of herself and
all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Academy of Actuaries, as amicus curiae, in support of the petition for certiorari filed in this case. Consent from counsel for both sides has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The American Academy of Actuaries (the "Academy") was formed in 1965 as a national accrediting organization by three existing national actuarial organizations—Casualty Actuarial Society, Conference of Actuaries in Public Practice, and Society of Actuaries (the "founding organizations"). The Academy and its founding organizations, or their predecessors, have represented the actuarial profession in the United States for over 90 years. There are currently more than 7,000 members of the Academy. A substantial number of these actuaries are engaged in the determination of the value of annuities offered by insurance companies, in the design and administration of employee retirement plans, and in helping to ensure the financial soundness of those plans.

This case involves those provisions of Title VII that make it unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a)(1) (1976). At issue is how this phrase is to be interpreted where part of the amounts paid to an employee in return for services are not received by the employee currently but are received at a later time and may be contingent upon continued employment for a given period or upon how long the employee lives. In this context, "compensation" can mean either the amounts paid or set aside by the employer at the time the work is performed for the purpose of making payments in the future, or the retirement benefits or amounts received by the employee at or after retirement, or, conceivably, both. The issue is a subtle and intricate one. Its correct determination, we believe, requires a full understanding of the relationship between the dollar amounts received by the employee and the cost to the employer of providing those benefits. This relationship is central to the work of the actuary who practices in the pension area.

Actuarial work requires special training and experience and an understanding of a branch of mathematics—actuarial science, which includes the theory of probability and statistics—without which anyone dealing with averages and the classification of risks can fall rather easily into serious error. We are, accordingly, in the unique position of being able to offer the Court accurate information about the structure and operation of employee retirement plans that would be helpful in the consideration, and perhaps essential to the correct resolution, of this case.

REASONS FOR GRANTING THE WRIT

The decision below extends significantly the decision of this Court in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). That case involved a contributory defined benefit pension plan which required greater contributions by women employees than by men. Plans of that kind had almost never been adopted by private corporations and only infrequently by governmental entities. This case involves a voluntary savings and investment arrangement that permits employees of the State of Arizona to accept reduced current compensation in exchange for payments at a later time, a plan generally known as a deferred compensation plan. See I.R.C. § 457 (Supp. IV 1980). These plans are in widespread use and are significant in themselves. The decision below, however, if allowed to stand, will almost surely apply to an even more important class of retirement plans, namely, defined contribution pension and profit sharing plans.[1] It is also very likely to affect the structure of a still broader type of retirement plan,

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[1] It is under these plans that employers provide benefits for similarly situated men and women that have an actuarially equal present value but may be paid to the employees in monthly amounts that are not equal.

namely defined benefit pension plans.[2] It may also apply to still other forms of insured plans.[3]

The practical implications of the application of the decision to these broader classes would be serious. For example, many owners of small businesses and many governmental bodies have adopted defined contribution plans because they believe it essential to fix precisely and in advance the cost of providing retirement benefits for their employees. If the decision is allowed to stand, those employers are likely to refrain from providing benefits in the form of annuity payments that would last for the lifetimes of their employees—something which, had the decision below been different, could have been done without the danger of undesired and unexpected increases in cost. It was precisely those kinds of lifetime annuity benefits, however, that Congress sought to foster by providing favorable tax treatment for these plans. If the decision below stands, many hundreds of thousands, perhaps millions, of employees may well enjoy less attractive retirement benefits because their employers, unable to provide an annuity option without adding to the cost of the plan, will decide to drop the option. In addition, many thousands of employers who had justifiably believed that their plans were fully funded will be required to pay substantial additional amounts.

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[2] Statistics compiled by the American Council of Life Insurance indicate that by the end of 1980 the assets of trusteed pension and profit sharing plans amounted in the aggregate to $256,898,000,000. American Council of Life Insurance, 1981 Pension Facts 19. By far the largest part of this huge sum is held under defined benefit pension plans. These plans are ordinarily adopted by larger and medium-sized corporations. They have, for the most part, provided for pensions in identical monthly amounts for similarly situated retired men and women employees. Title VII is likely to affect such plans to the extent that they provide optional forms of retirement benefits, however, since such annuity options are often based on sex-distinct factors.

[3] See *infra* note 4.

Affected also will be private insurance companies, the efficient conduct of whose businesses requires that the prices charged for the assumption of risks be related as closely as possible to the costs resulting from the several classes of persons transferring those risks.[4]

It may be that Congress adopted a law that compels these results. But the decision below reflects a serious lack of understanding of the subject matter and, for that reason, does not provide the authoritative interpretation of the applicability of Title VII to employee retirement programs that is essential to those engaged, as we are, in the design and administration of those programs. Because *Manhart* applied only to a narrow and not very significant class of plans, it also did not provide that interpretation. This case, however, applies to retirement programs of far greater practical significance and provides the opportunity for such an interpretation. A decision by this Court would bring clarity to an area that is now confused and uncertain.

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[4] A direct result, if the decision below stands, is likely to be a substantial reduction in the business of life insurance companies, resulting from the decreased provision by employers of lifetime benefits. Indirect impacts may be much greater. To take one example, state insurance laws and regulations require that group life and health insurance contracts provide a terminating employee with the right to convert to an individual life or health insurance policy at individual rates used by the insurer. These individual rates are always sex-distinct, that is, they are different for males and females for the same coverage. An insurer could not merely create a set of unisex rates for such conversion while using sex-distinct rates on other individual insurance since that, too, would be in violation of state law. If the decision below extends to such plans, and there is reason to believe that it might, escape from this quandary will be difficult and would result in a major change in the way insurance companies conduct their business, notwithstanding the disclaimer of such a result in *Manhart*.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE For Tax Deferred Annuity And Deferred Compensation Plans, State Of Arizona, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition

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QUESTION PRESENTED

Arizona established a *voluntary* deferred compensation plan, funded entirely by the employee out of his or her wages or salary. The employer made no contribution. The plan includes a lump sum option and makes available a life annuity option providing equal value to men and women, utilizing sex-specific actuarial tables in recognition of the fact that women, as a class, live longer than men, thereby providing smaller *periodic* payments to women.

The question is whether this plan violates Title VII of the Civil Rights Act of 1964.

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Brief of American Council of Life Insurance as Amicus Curiae in Support of the Petition

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This brief is filed on behalf of the American Council of Life Insurance, as amicus curiae, in support of the petition for certiorari. Consent from counsel for both sides has been filed with the clerk of this Court.

INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") is the largest life insurance trade association in the United States, representing the interests of 550 member life insurance companies including most of the major life insurers in the United States. Its members currently hold more than ninety-five percent of the life insurance in force in legal reserve life insurance companies in the United States. The Council has a direct and immediate interest in insurance practices generally and in particular in the sound administration of pension plans. Member companies account for ninety-nine percent of the insured private pension plan business in the United States. The Lincoln National Life Insurance Company, the private insurance company offering the life annuity option at issue here, is a member of the Council.

The pension industry is large and affects many individuals. In the United States at the end of 1980, 26.1 million Americans were covered by private pension plans administered by U.S. legal reserve life insurance companies. *See* American Council of Life Insurance, 1981 Pension Facts. Assets backing these plans reached $165.8 billion, an increase of 19 percent over the immediately preceeding year. *Id.* State and local government-administered retirement plans held $185.2 billion in assets and covered an estimated 13.9 million persons in 1980. *Id.*

Virtually all insurance companies, including members of the Council, have historically utilized sex-specific actuarial tables in calculating benefits under defined contribution plans, to account for the fact that, as a class, women live longer than men. Thus, the decision below prohibiting the use of sex-specific actuarial tables will directly affect the current and future business operations of all insurance companies. Such a judicially forced break with the past will indeed revolutionize the insurance industry. An internal study conducted by the Council estimates that a prohibition against using sex-specific actuarial tables in a retirement plan could increase the costs of retirement plans by as much as two billion dollars per year. The Superintendent of Insurance of New York has estimated that a total of $1.9-$2.1 billion would be needed to equalize the

results of sex-distinct tables as of the date of *Manhart* to New York funded pensions, enough possibly to bankrupt the system. Lewis, *Manhart et Sequentia: A 20 Billion Dollar Cost to Local Government?* 7 Employee Benefits Journal 8, 13 (1982). The Council is concerned about the continued viability of employee retirement plans, since careful underwriting is the essence of insurance, and it is likewise concerned that such plans continue to be administered on the basis of sound actuarial principles.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 671 F.2d 330. A copy of the opinion is reproduced in the Appendix to the Petition. The opinion of the United States District Court for the District of Arizona is reported at 486 F. Supp. 645; it is set forth in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on March 11, 1982. An extension of time for filing the Petition was granted on May 13, 1982 to July 12, 1982, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 in pertinent part provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

Arizona Revised Statutes sections 38-871 to 38-874 are set forth in the appendix to the Petition.

STATEMENT

The Arizona Deferred Compensation Plan (Ariz. Rev. Stat. § 38-871 *et seq.*) is a voluntary savings and investment plan established by the Arizona legislature to provide the approximately 35,000 state employees with the option to defer compensation, and the taxation on that income.[1] *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 648 (D. Ariz. 1980). The statute authorized the Arizona Governing Committee For Tax Deferred Annuity And Deferred Compensation Plans ("Governing Committee") to contract with private institutions for the purpose of establishing various tax deferred compensation and annuity programs. *Id.* at 647. The Governing Committee selected certain companies as funding media through which state employees could elect to defer compensation. *Id.* at 648. The plan is offered strictly on a voluntary basis to all state employees and is funded entirely by employee contributions. *Id.*

Under the plan, employees may, if they choose, have sums deducted from their pay and contributed to the plan. The employee has several further options, and these options occur both at the time of investment and at the time of retirement. At the time of investment, the employee may have his or her funds placed in savings accounts, mutual funds, life insurance, or various types of annuities, including annuities for a fixed amount (as long as the accumulation lasts), annuities for a fixed period, and life annuities.

The plaintiff in this case chose to participate in the plan, and she also chose to have her funds invested in a life annuity to be provided by Lincoln National Life Insurance Co., a private company, unconnected with the Government of Arizona. After making that choice, but before the annuity period had begun, the plaintiff, on behalf of herself and all female employees enrolled in the plan, brought a class action alleging that the private insurance company's utilization of sex-specific

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[1] The Arizona Deferred Compensation Plan is not a state operated retirement plan. The state retirement plan (A.R.S. §§ 38-741-781.36, as amended) is entirely separate and provides for equal benefits and equal contributions.

actuarial tables, resulting in women receiving smaller monthly annuity payments than similarly situated men, constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Upon reaching retirement (which the respondent has not yet done), the employee has a further option. The retiree may elect to receive the accumulated value of his or her account in "a lump sum" (Stipulation in the district court, ¶ V), and thus receive the accumulated deferred compensation at once. *Id.* He or she may, as an alternative, elect to receive an annuity for a fixed period. Or the retiree may elect a life annuity.

The plaintiff, in initiating the transaction, made the preliminary choice of a life annuity. Following the long established industry practice of using sex-specific actuarial tables to account for the fact that women as a class live longer than men, the Lincoln National Life Insurance company entered into a contract with the plaintiff that provided for life annuity payments based on sex-specific actuarial tables. *Id.* It is stipulated that all insurance companies participating in the plan use sex-specific actuarial tables in computing life annuity benefits. (Joint Statement, p. 8). Because the plaintiff, pursuant to her initial voluntary election of a life annuity, and if she makes no further election, would receive smaller *periodic* payments than male employees electing a life annuity with the same premium payment, plaintiff contends that the plan discriminates in violation of Title VII and the equal protection clause.

Proceedings Below

On a motion for summary judgment the parties entered into a stipulation of facts. On the basis of these facts, both the district court and appellate court below recognized the fact that the Arizona Deferred Compensation Plan was distinguishable from the employer operated defined benefit plan in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702. The district court concluded that the broad general principles articulated in *Manhart* required the same result as that reached by this Court there. 486 F. Supp. 650.

The district court considered this Court's approval in *Manhart* of a plan which permitted an employee to purchase the largest benefit which his or her accumulated funds could command in the open market (the "open market exception"). The district court found that although the Arizona Plan was voluntary it did not permit employees to purchase a retirement program in the open market since, if the employee wanted a life annuity, it had to be selected from those offered by insurance companies using sex-specific actuarial tables. 486 F. Supp. at 650. The district court said that the lump sum option contained in the plan had ". . . no bearing on the lawfulness of the plan." *Id.* The court noted that most women initially selected the life annuity option, but it gave no reason for disregarding the lump sum option which is equally open to all members of the plan. On this basis, the district court held that because the plan permitted smaller monthly annuity payments to a female employee than to a similarly situated male employee contributing the same amount, it violated Title VII. 486 F. Supp. at 652.

With respect to the equal protection claim the district court found no violation since there was no showing of purposeful discrimination on the part of the state. The parties had stipulated that the sex-based classifications found in the actuarial tables were not made by defendants, but instead had resulted from the judgment of third-party insurers. *Id.* at 651. The district court enjoined the defendants from using sex-specific actuarial tables in the administration of the plan, and although the defendants do not make any payments under the plan, and do not hold any funds under the plan, it ordered them to pay retired female employees supplementary amounts so that their monthly annuity payments would equal those received by similarly situated male employees. *Id.*

The court of appeals affirmed in a two to one decision, with District Judge Nielson dissenting. Casting aside *Manhart's* unique factual setting in favor of an expansive application of its reasoning, the Ninth Circuit refused to distinguish the Arizona Plan. Citing footnote 33 in *Manhart*, indicating that an employer could not escape liability by setting up corporate shells, the court of appeals reasoned that *Manhart* was not

limited to employer-operated retirement plans. Although recognizing that "Title VII governs the relationship between employees and their employer, not between employees and third parties," 671 F.2d at 333, it applied the *Manhart* rationale here as well, on the basis that the employer had made available private insurance companies to operate some of the elective portions of the plan. *Id.* at 334.

Regarding the open market exception in *Manhart,* the court below decided that the lump sum option did not legitimize the life annuity option, which it considered to be discriminatory. In response to the defendant's contention that the plan merely reflected the natural limits found in the market place, the court of appeals said that Title VII did not allow an employer to maintain a discriminatory practice because it is found in the market place. *Id.* at 335.

Defendants further asserted that a Title VII violation required a showing of an intent to discriminate against women. While the court of appeals indicated that *Manhart* had not addressed the issue, it read the decision as not requiring an affirmative showing of intent. The court disposed of the defendant's contention that the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.,* prohibited the application of Title VII here by making the rather dubious observation that the district court decision had not interfered with the business of insurance. Because the district court had not issued an injunction against the private insurance companies participating in the plan, the court of appeals reasoned that the insurance industry practice of using sex-specific actuarial tables had not been interfered with in violation of the McCarran Act.

In a dissenting opinion Judge Nielson concluded that "Arizona's voluntary Deferred Compensation Plan falls clearly within the *Manhart* open market exception." 671 F.2d. at 336.

REASONS FOR GRANTING THE WRIT

1. The Court Below Misinterpreted *Manhart* When It Failed to Recognize That There Is Equality of Treatment Consistent With Title VII when an Employee Retirement Plan Allows Equal Payments In and All Receive Equal Value Out.

As this Court recognized in *Manhart*, 435 U.S. at 704, women as a class live longer than men.[2] The court in *Equal Employment Opportunity Commission* v. *Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978) observed that "an insurance company cannot disregard this fact, any more than it can disregard age, or fail to require premiums and create reserves that will fund its total ultimate obligations in light of the expectancy of its policyholders." In any scheme of insurance individuals must be grouped on the basis of the risk each represents. This is the nature of insurance. The decision below in effect negates this concept, and, in the process, has interpreted Title VII in a manner that will revolutionize the insurance and pension industries, contrary to this Court's explicit direction in *Manhart*.

1. In support of its holding, the district court below sweepingly asserted that Title VII requires women to be treated as individuals and that a generalization about a class, even if true, cannot be applied to an individual woman. 486 F. Supp. 650. *Manhart* required that men and women be treated as individuals during the *pay-in* process. An employer could not reduce a woman's take-home pay by *requiring* her to contribute a greater amount than a similarly situated man. The Arizona Plan complies with this mandate. It does not require unequal employee contributions. Indeed, it does not require any payments from anyone. It is entirely voluntary.

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[2] Data compiled after the 1978 *Manhart* decision continue to confirm this fact. Recent statistics based on the 1980 census indicate that the longevity differential between men and women at age 65 has remained at approximately four years. Metropolitan Life Insurance Co., 62 Statistical Bulletin No. 2 (1981).

Where an employee voluntarily elects to take an annuity, he or she enters into a process of insurance, which inevitably involves risk-spreading. Accurate risk classification is essential for maintaining the financial solvency of a finite fund which is subject to partial liquidation conditioned on the occurrence of events, such as death or disability, which are unpredictable on an individual basis. The very meaning of insurance is the sharing of individual risks among *groups*. Some individual characteristics—age and sex—are taken into account, but it is *impossible* to treat the insured persons as individuals throughout the process, since it is impossible to tell how long a particular individual will live until he or she dies.

Men and women may be treated as individuals either in the pay-in part of the process, or in the pay-out part of the process, but not in both. Under a life annuity, an insurance company is contractually bound to pay a sum of money to an individual for life. Because it is unknown how long an individual will actually live, an insurer, if it is to remain solvent, must estimate its expected pay-out per individual by grouping individuals on the basis of age and sex—the two most significantly reliable factors statistically shown to quantify the risk of longevity.[3] Sex- specific actuarial tables account for the fact that individually, every women has the same statistical probability of outliving men of the same age. In the context of insurance

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[3] In *Peters v. Wayne State University*, 476 F. Supp. 1343, 1345, n.2 (E.D. Mich. 1979), the plaintiffs contended that other life expectancy predictors, such as health, weight, smoking, etc., could be used in computing annuity rates. However, the court found that the evidence demonstrated "that only the immutable factors of age and sex could be used." 476 F. Supp. at 1345, n.2.

Insurers do, of course, utilize these other factors in assessing the risk of individual life insurance applicants and "select risk" policies for non-smokers, non-drinkers, etc., are commonplace in the insurance market. Even in the annuity market, where these other factors have an opposite effect on insurer liability (i.e., the good health risk would be expected to live longer than average, and increase the annuity risk) insurers have in recent years marketed annuities to persons with severe health problems on a "substandard", or reduced rate, basis. These are frequently utilized in structured settlement cases involving personal injury and workmen's compensation claims. However, in the broad market for individual annuities it would not be economical to establish multiple rating classes for annuities in view of the paucity of interest among unhealthy individuals.

this treats men and women as individually as it is possible to do given the fact that there is no way to determine in advance when an individual will die. This fact distinguishes classifications used in insurance from other classifications such as height and weight requirements which are easily measured on an individual basis.

Since we cannot know in advance how long an individual will actually live, it is not possible to treat women or men as individuals in terms of the pay-out under an annuity contract. A particular woman may receive more or less than any man (or for that matter, any other woman) in the group receives, and vice versa. However, what we do know is that if contributions into the plan are equal, and periodic payments are the same, women as a group will receive more than men do. If women are to receive *equal value* for equal contributions paid-in, then women must receive smaller *periodic* payments. The use of sex-specific actuarial tables provides aggregate payments equal in value for both men and women.[4] *See* Kimball, *Reverse Sex Discrimination: Manhart,* 1979 Am. Bar Fdn. Research J. 82. Thus by providing the same "value package," the Arizona Plan treats state employees fairly and equally.

In contrast, prohibiting the use of sex-specific actuarial tables as the court below has done will be sure to provide greater value to women and thus to work discrimination against men. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited* 49 U. of Chi. L. Rev. 489 (1982). If a man and a woman acquire the right to receive equal monthly payments for life, there is no doubt that the *value* of the women's *right* to the annuity is greater than the value of the right of the man of the same age. This fact is illustrated by the tax laws which utilize sex-distinct mortality tables in computing the "fair market value" of annuities. *See* I.R.C. § 170, 403, 691; Treas. Reg. §§ 1.72-9, 20.2031-10, 25.2512-9. Under the Arizona Plan the insurer is obligated to

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[4] *Equal Employment Opportunity Commission* v. *Colby College,* 589 F.2d 1139, 1142 (1st Cir. 1978) and *Peters* v. *Wayne State University,* 476 F. Supp. 1343, 1349 (E.D. Mich. 1979) (appeal pending), expressly noted that pension plans utilizing sex-specific actuarial tables resulting in smaller periodic benefits for women provided actuarially equivalent benefits.

repay the accumulated value of each employee's account. If the employer currently pays an additional amount into a female's account to equalize periodic benefits in accordance with the district court's order, the accumulated value of the female's account will be greater than the male's. Upon retiring, female employees may then elect the lump sum option and immediately realize the increased value of their accounts. This is clear discrimination in favor of women.[5]

2. The decision below disregards *Manhart's* accommodation of the proper scope of Title VII with the open market exception. This Court, in *Manhart*, explicitly declared that "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18. The Arizona Plan complies with these guidelines in two ways. First the plan is voluntary. Thus, state employees who do not choose to participate may in the first instance receive all of their compensation and spend these funds, or use them to purchase the largest benefit in the open market by selecting their own deferred compensation plan.[6]

For those who do choose to participate, the lump sum option permits an employee to purchase the largest benefit obtainable in the open market by allowing the employee to take the total accumulated value of his or her account in a lump sum on his or her retirement. The district court below erred when it

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[5] As this Court noted in *General Electric Co. v. Gilbert*, 429 U.S. 125, 139 n.17, the cost to insure against the risks in an employee benefit plan is, "in essence, nothing more than extra compensation to the employees, in the form of fringe benefits." Thus, the district court's order requiring Arizona to pay the added costs to equalize periodic benefits may well violate the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d). By selecting the lump sum option, a woman would immediately realize the greater value of her account and receive greater total remuneration for services rendered than a similarly situated male. Even if she takes the annuity, she receives greater value for her services than the male.

[6] Passage of the Economic Recovery Tax Act of 1981 has extended individual retirement account eligibility to persons covered by employer pension plans.

said that "[t]he Plan offered by the State of Arizona does not permit an employee to use his or her accumulated funds and purchase a retirement program in the 'open market.'" 486 F. Supp. at 650.

3. The decision below would further revolutionize the insurance and pension industries, by extending the coverage of Title VII to wholly independent third-party insurers, clearly not an agent or corporate shell of an employer. In *Manhart*, this Court stressed that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." 435 U.S. at 718, n.33. It also warned that employers could not avoid their responsibilities by delegating discriminatory programs to corporate shells. *Id.* Since the plan in *Manhart* was an employer-operated pension fund, Title VII clearly applied. Here, however, the decision of the court below in effect prohibits the use of sex-specific actuarial tables by independent private insurance companies in connection with the Arizona Plan.

There is no dispute over the fact that the private insurance companies involved in the Arizona Plan are not agents or corporate shells of the defendants. In fact the district court below denied the equal protection claim on the ground that the use of sex-specific actuarial tables had not been directed by defendants but rather had resulted from the insurer's judgment. *See* 486 F. Supp. at 651. Yet in the face of *Manhart's* explicit acknowledgment that Title VII primarily governs relationships between employers and employees, not between employees and third parties, the Ninth Circuit significantly expanded the scope of Title VII by applying it to the Arizona Plan simply because the employer had designated certain private insurance companies to operate one of the options under the plan. 671 F.2d 331. This "general designation theory" reaches all private insurance companies that independently operate some portion of employee retirement plans for employers. This unprecedented extension of Title VII to the private insurance industry warrants the grant of the writ of certiorari.

2. The Decision Below Greatly Expands the Scope of *Manhart* and Resolves a Statutory Issue of Great Practical Significance In A Way Which Would Revolutionize the Insurance Industry.

The inevitable impact of the decision below touches virtually every deferred compensation and retirement, pension or similar plan operated by a private insurance company for an employer covered by Title VII. Private insurance companies, in meeting their actuarial responsibilities, have universally utilized sex-specific actuarial tables to give recognition to the fact that, as a class, women live longer than men. This practice has enabled insurance companies offering life annuities to determine accurately the various costs and reserve requirements associated with annuities, to establish equitable annuity purchase rates based on life expectancy, and to ensure their financial solvency. The absence of an authoritative resolution of the decision below will perpetuate the uncertainty and confusion that now exists regarding sex-specific actuarial tables, hampering the efforts of actuaries and plan administrators to act responsibly in operating employee benefit plans, and create serious difficulties for insurance commissioners concerned with their solvency, ultimately jeopardizing the insureds' benefits.

1. Both courts below agreed that the Arizona Deferred Compensation Plan was factually distinguishable from the employer-operated defined benefit plan in *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702. The *Manhart* opinion was narrowly written and carefully guarded. Any doubt concerning its intended scope was seemingly removed when this Court said:

> All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor

> does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.

435 U.S. at 717-18. Historically, insurance companies have used sex-specific actuarial tables in considering the composition of an employer's work force. Yet the decision below in effect prohibits the utilization of sex-specific actuarial tables anytime an employer covered by Title VII designates a private insurer to make available a life annuity on a wholly optional basis, without contribution from the employer. Thus, the decision below extends well beyond the bounds contemplated in *Manhart*,[7] and the consequence could be a drastic revolutionizing of many privately insured pension and deferred compensation plans in the United States.

2. Indeed, the revolutionizing impact of the *Norris* decision on the insurance industry has already reached beyond the Arizona Deferred Compensation Plan at issue here. The County Counsel for Orange County, California has recently issued Opinion No. 82-S35 advising all school and community college districts that the Ninth Circuit's decision in *Norris* requires them to cease immediately approving *any* employee fringe benefit utilizing sex-distinct actuarial tables. (*See* Appendix A for text of Opinion.) Notwithstanding the questions left open in *Manhart*, the variety of plan options made available to participants, and the lack of employer involvement in selecting plans for Orange County employees,[8] the Opinion

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[7] The brief of the American Academy of Actuaries in *Manhart* noted that since an employer-operated defined benefit plan like the one before the Court there was exceedingly rare, there would not be a widespread effect if equal employee contribution rates were required. *See* Brief for the Society of Actuaries and the American Academy of Actuaries as Amici Curiae at 18. However, in addressing the problems that would arise if the sex of an employee could not be taken into account, the Academy warned that "[i]n particular, a determination that the amount of employee benefits in any form must be identical for both sexes would have a dramatic impact." *Id.*

[8] California Ins. Code, § 770.3, specifically provides that: ". . . the state has no financial interest in an annuity purchased for an employee where the premium therefor is paid from a deduction from or reduction in the

(footnote continues)

concludes that the "law is abundantly clear and that it requires all employers to either terminate any presently existing deferred compensation plans, group life insurance or tax sheltered annuity contracts based on sex differentiated actuarial tables or to continue them only on the condition that the employer or the contractor pay equal benefits to all employees, regardless of sex." In fact, this opinion places insurers in the difficult position of having either to terminate existing tax sheltered annuities purchased by school teachers in Orange County, violate California Insurance Code § 790.03(f),[9] or indemnify the school districts for any liability they incur for increased annuity benefits for female school teachers. As this opinion clearly shows, in the absence of review by this Court, the *Norris* decision will have a widespread impact, seriously disrupting the administration of pension and retirement plans, and jeopardizing the interests of individual participants in such plans.

3. The stipulated facts of this case raise new issues, including many that *Manhart* purportedly reserved for another day, making it the appropriate case for a grant of certiorari. The present case, for example, involves a *lump sum option* which clearly provides equality; and it squarely raises *the open market* exception. Moreover, since this case involves a private insurance company administering a voluntary defined contribution plan for an employer, and not an agent or corporate shell of an employer, it is factually distinct from *Manhart*, and it is

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(footnote continued)

employee's salary, and any annuity paid for through such a deduction or reduction shall not be deemed to have been provided by the state for its employees for purposes of this section, and the state shall not negotiate or require the placing of such annuity through particular agents, brokers, or companies . . . "

[9] Cal. Ins. Code §790.03(f) provides that " . . . for any contract of ordinary life insurance or individual annuity applied for and issued on or after January 1, 1981, [this section] require(s) differentials based upon the sex of the individual insured or annuitant in the rates or dividends or benefits, or any combination thereof. This requirement is satisfied if such differentials are substantially supported by valid pertinent data segregated by sex, including, but not necessarily limited to, mortality data segregated by sex."

likewise representative of similar issues raised in other lower court decisions.[10]

Indeed the significance and complexity of the statutory issues here and the need for clarification of the law in this area is best shown by the host of lower court decisions which have turned to the broad general principles articulated in *Manhart* as justification for finding a violation of Title VII. *Sobel* v. *Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979), involved a pension plan funded by a private insurance company that required equal contributions but resulted in smaller periodic benefits for women because benefits were computed from sex-specific actuarial tables. In refusing to resolve the issue on a motion for summary judgment, Judge Gottel aptly noted that "the problems which arise in regard to the pension claim are somewhat vexing. To a substantial degree this results from the difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." *Id.* at 1166. For the past five years the companies funding most of the pensions of faculty members in colleges and universities in the United States and Canada (Teachers Insurance and Annuity Association and College Retirement Equities Fund) have been involved in extended litigation. *See Equal Employment Opportunity Com'n* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Peters* v. *Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979) (appeal pending); *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 475 F. Supp. 1298 (S.D.N.Y. 1979) (appeal pending).

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[10] *See Equal Employment Opportunity Com'n v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (equal mandatory pension contribution; smaller monthly payments to women); *Shaw v. Inter. Ass'n of Machinists & Aerospace Workers*, 24 F.E.P. 995 (C.D. Cal. 1980) (BNA) (equal mandatory contribution for joint and survivor annuities, smaller monthly payments); *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979) (mandatory retirement; women contribute equally but received smaller monthly payments); *Spirt v. Teachers Ins. & Annuity Ass'n of America*, 475 F. Supp. 1298 (S.D.N.Y. 1979) (equal mandatory pension contributions; smaller monthly payments to women); *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979) (equal mandatory pension contributions; smaller monthly payments to women); *Henderson v. St. of Or. By & Through Bur. of Labor*, 405 F. Supp. 1271 (D. Or. 1975) (equal mandatory retirement contribution, smaller monthly payments to women).

4. If an employer offers a life annuity option and is forced to pay the added costs attributable to longer female lives, a prohibition against using sex-specific actuarial tables will provide a strong incentive to discriminate against women in hiring—a result that directly conflicts with the Civil Rights Act. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited,* 49 U. of Chi. L. Rev. 489, 532-36 (1982). The decision of the court below enjoining defendants from making available a wholly optional annuity based on sex-specific actuarial tables has already had the effect of eliminating the life annuity option from the Arizona Plan. To comply with the lower court's decree, if annuity options are to be made available, they will have to be based on male rates, female rates or "unisex" rates (a mixed average somewhere between the male and female rates). If male rates are used, the fund will quickly become insolvent, since longer female lives have not been properly provided for. A plan using female rates or unisex rates would always be subject to adverse selection by the male employees.[11] If unisex rates are used, the plan would be unstable. The security of a unisex plan, and its solvency at any given time, would depend upon the continuing accuracy of the ever-changing "mix."

5. It is the proper function of this Court to provide guidance and clarification to the lower courts concerning practical and important issues of statutory interpretation such as that involved here. *See, e.g., Teamsters* v. *United States,* 431 U.S. 324 (certiorari granted to consider significant questions presented under the Civil Rights Act of 1964). The importance of the statutory question presented here, the lower court's expansive reading of this Court's narrowly guarded decision in *Manhart,* and the pervasive and inevitable restructuring of deferred compensation programs and retirement, pension and

[11] The destructive effects of adverse selection in insurance have been historically documented. *See* Bailey, Hutchison and Narber, *The Regulatory Challenges to Life Insurance Classification,* 25 Drake L. Rev. 779, 784-85 (1976). Rather than subsidize women in a plan formulated on the basis of unisex rates, male employees motivated by a natural desire to maximize benefits will purchase life annuities in the open market from an insurance company using lower male rates.

similar plans that will occur throughout the United States under the decision below, constitute persuasive grounds for granting certiorari. *See Southeastern Community College* v. *Davis*, 442 U.S. 397 (certiorari granted because of the importance of the issue involving discrimination against handicapped individuals to the many institutions covered by section 504 of the Rehabilitation Act of 1973).

Here, the statutory issue directly questions the scope of a decision previously rendered by this Court. Such a legal and factual setting supports the grant of certiorari. For example, the Court has several times granted certiorari to consider the proper scope of its holding in another Title VII case, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, the Court granted certiorari "to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case." *Id.* at 569.

Five months after *Furnco*, the Court handed down a clarifying per curiam opinion in *Board of Trustees of Keene St. Col.* v. *Sweeney*, 439 U.S. 24. In 1981, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, again addressed the nature of the evidence necessary to rebut the plaintiff's prima facie Title VII case. *See also Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 138 (certiorari granted to decide, in light of the opinion in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, whether the lower courts properly applied Title VII to the employment policies in question). Here, as in *Furnco* and *Nashville Gas Co.*, the lower courts broadly construed a prior decision of this Court and in the process greatly extended the coverage of Title VII. There is here a similar need for clarification.

CONCLUSION

For all of the reasons set forth above and for the additional reasons advanced in the petition in this case, the writ of certiorari should be granted.

Respectfully submitted,

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July, 1982

APPENDIX

FOR IMMEDIATE ATTENTION

OFFICES OF
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June 18, 1982

To All School and
Community College Districts

Re: Tax Sheltered Annuities and Deferred Compensation Plans Containing Sex Differentiated Benefits
SX-260
Op. No. 82-S35

Members of the Board:

The United States Court of Appeals for the Ninth Circuit has recently rendered a decision which has ramifications for tax sheltered annuities and deferred compensation plans and other fringe benefits which may be offered by employers to employees on a voluntary basis. *Norris v. Arizona Governing Committee* (1982), 671 F. 2d 330. The case involved the State of Arizona's plan, permitting tax deferred annuities and compensation to be made available to all employees on a voluntary basis. The plan was authorized by statute and was entirely funded by employee contributions. It offered various options including: (1) a lump-sum nondiscriminatory payment; (2) a fixed sum for a fixed period of time; and (3) a life annuity contract whereby each employee could elect to receive a certain amount of money each month for life. The State of Arizona selected the companies with which the employee could contract

and all of such companies used sex segregated mortality tables in computing monthly amounts due under the life annuity contract. Thus, women, who as a class live longer than men, received smaller monthly payments than men. The State of Arizona argued that its plan reflected the marketplace, i.e., all available options outside the employment context, and also argued it took no active part in the administration or development of the plan.

The Ninth Circuit Court of Appeals rejected Arizona's arguments that the plan was purely voluntary, that the State took no active part in the plan, and that nondiscriminatory options were available to all employees. The Court noted that the State adopted the plan, made the selection of companies as funding media, approved participation in the plan, and deducted the appropriate amount from employees' salaries. The Court held: (1) the plan was unlawful under Title VII and the Supreme Court case of *Los Angeles Dept. of Water and Power v. Manhart* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed. 2d 657 (1978); (2) the existence of nondiscriminatory options does not legitimize the discriminatory options because the plan did not offer equal benefits to women; (3) it affirmed the lower federal court's order permanently enjoining the defendants from the use of sex-segregated tables and directing that future annuity payments to female employees who have retired shall be equal to similarly situated male employees.

We have learned that the State of Arizona intends to file a petition for certiorari in the U.S. Supreme Court. Such a petition does not, however, affect the ruling of the Appeals Court; and, unless and until the United States Supreme Court reverses the decision, the law of the case is binding in this jurisdiction. Accordingly, our advice to all school districts and other public agencies is to immediately cease to approve any fringe benefit including tax sheltered annuities and deferred compensation plans which contain benefits based on sex-segregated actuarial tables or which provide different annuity payments as between sexes, based on life expectancy.

While we assume that all companies which have contracted with districts with respect to tax sheltered annuities have executed the hold harmless agreements, which we have required be made a condition of contracts approved by this office, we believe that the enforcement of such hold harmless agreements, with respect to civil rights cases analogous to *Norris, supra,* may be difficult, time-consuming, and speculative. This is so despite our belief that the language in the form agreement clearly covers such an eventuality. In the *Norris* case, the insurance companies were not joined as defendants, 671 F. 2d at 333, so that we can only hypothesize that no hold harmless agreements were in effect. As a result, the employer in that case will apparently have to assume the obligation of paying the additional amounts ordered by the Court.

We believe that for present purposes the law is abundantly clear and that it requires all employers to either terminate any presently existing deferred compensation plans, group life insurance or tax sheltered annuity contracts based on sex differentiated actuarial tables or to continue them only on condition that the employer or the contractor pay equal benefits to all employees, regardless of sex. Such benefits must extend to all individuals similarly situated on an equal basis and may not be based on stereotypical class characteristics. Differentiation on the basis of sex may take many forms, some of which discriminate against males (*Chastang v. Flynn & Emrich Co.* (C.A. Md. 1976), 541 F. 2d 1040), and our clients are strongly advised to study carefully all conditions, terms, provisions and exceptions to such agreements. To the extent Our Op. No. 82-S27 suggested a hold harmless agreement would be sufficient, it is hereby modified.

In the past we have approved tax sheltered annuities and deferred compensation plans based on agreements submitted to us without inquiring as to actuarial tables used or other conditions not incorporated within the body of the agreements transmitted to this office. Our procedure hereinafter will require the proposed contractor to certify that the agreements submitted constitute all of the terms, conditions, provisions and actuarial tables utilized in determining costs and benefits.

Should you desire the assistance of this office in determining the legality of those contracts previously entered into which appear to be questionable, we shall be happy to aid you in such a review. Since we understand, however, that the use of sex-based tables is a nigh universal practice, *we suggest that as a first step, where a question appears manifest, you obtain a letter from the contractor stating that sex-based actuarial tables were not and are not presently utilized in determining costs or benefits.*

We shall keep you informed of any further developments in the law involving these issues.

Very truly yours,

ADRIAN KUYPER, County Counsel

By /s/ IRYNE C. BLACK

Iryne C. Black, Deputy

Office - Supreme Court, U.S.
FILED
SEP 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-52

IN THE

Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, and RICHARD RABAGO, MARGARET GRIFFITH, TED WILLIAMS, RUSS WEBB, WALTER NADSEN, DAVE CONNER and JACK LA SOTA, in their capacity as members of the GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS,

Petitioners,

vs.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF THE STATE OF CALIFORNIA (STATE TEACHERS' RETIREMENT SYSTEM) AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

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IN THE

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ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, and RICHARD RABAGO, MARGARET GRIFFITH, TED WILLIAMS, RUSS WEBB, WALTER NADSEN, DAVE CONNER and JACK LA SOTA, in their capacity as members of the GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS,

Petitioners,

vs.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

BRIEF OF THE STATE OF CALIFORNIA (STATE TEACHERS' RETIREMENT SYSTEM) AS AMICUS CURIAE IN SUPPORT OF THE PETITION.

This brief is filed on behalf of the State of California State Teachers' Retirement System, an amicus curiae, pursuant to Rule 36 in support of the petition for certiorari, previously filed herein on July 12, 1982. Consent of all parties is not required by reason of Rule 36.4.

Interest of the Amicus.

The State of California, by and through its State Teachers' Retirement System ("STRS"), operates a retirement system for school teachers in the State. STRS has more than

300,000 members, of whom approximately 120,000 are male and 190,000 are female.

It has almost 70,000 "service" retirees. Over 52,000 of the "service" retirees are female.

Under the California statutes providing a Retirement System for Teachers (Cal. Educ. Code, § 22001 *et seq.*) each teacher contributes the exact same amount to the System based upon his or her salary. Sex is not a factor. Monthly salary is the only relevant fact in computing the retirement contribution. Contributions to the System are also made by the public school district employers with some funding to the System from the State General Fund.

The Teachers' Retirement System provides at date of retirement to members similarly situated, male and female, a retirement allowance that is equal. At time of retirement two similarly situated male and female STRS members will have been making equal contributions and the basic unmodified benefit will be the same whether the retirant is a male or female. The normal standard form of service retirement benefits, the unmodified allowance, is computed by utilizing the factors of final compensation, years of service and retirement age. For example, any 60-year-old retiree (male or female) with a highest final[1] compensation of $2,000 per month and 32 years of service will receive a monthly retirement benefit of $1,280 until death. For convenience of computation, age 60 was selected. At age 60, the formula is $2,000 (highest monthly compensation) × 32 (years of service) × .02 (age factor). The result is the $1,280 per month retirement benefit.

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[1]The term "final compensation" is used to mean the average monthly compensation during the three highest years of compensation. Usually, this would be the final three years of employment.

An employee, upon retirement, may withdraw his/her accumulated contributions from the System. The person may take "his/her money" and invest it in real estate or in the stock market or in a poker hand. (This does not include contributions by the school district employers.)

The employee has other options at time of retirement — methods which he may voluntarily select to receive his or her retirement benefits. These voluntary option systems have certain similarities to the Arizona plan that this court is being urged to review.

This is how California's voluntary option selection works:

The retiree's basic retirement benefit or unmodified allowance is computed by reference to age, years of service and amount of "final" compensation. Then the "present value" of the retiree's benefit allowance is computed. By nominating an option beneficiary, the retiree chooses to insure the life of a potential survivor. The present value of the retirement allowance is paid out over two lives: the retiree's life and the option beneficiary's life.

When an option is chosen, the sex of the retiree is taken into account in determining the present value of retiree's unmodified allowance. The sex of both the retiree and his/her beneficiary is taken into account in determining the discount to be applied to the monthly benefit. Sex is not a factor in any computation other than the computation to figure the monthly benefits under the option system. The selection of an option is entirely voluntary. It is simply a method to collect the benefits established by statute.

Inasmuch as women (as a class) live longer than men, women who choose an option will tend to receive a higher monthly benefit than men because the present value of their unmodified allowance will tend to be greater due to the greater life expectancy of women.

In *Probe and Simmons, et al. v. State Teachers' Retirement System* (Calif. Central Dist., Ct. No. CV-79-0522-MRP), the State Teachers' Retirement System's option system was ruled to be a violation of Title VII of the 1964 Civil Rights Act, as construed by *Los Angeles Department of Water & Power v. Manhart* (1978) 435 U.S. 702.

The trial court ordered the State of California to "equalize" benefits for males and females under the option system, the cost of which may amount to $1,000,000 per month in a time of tightened budgets and for an agency already borrowing from the State's general fund.

The State of California is vitally interested in the instant matter because it deals directly with two arguments that the State of California has relied upon in its case before the federal courts. That is, the scope of the "open market" exception and the voluntary nature of the option system.

REASONS FOR GRANTING THE PETITION.

I.

The Arizona System Complies With the Holding in Manhart.

This court should grant certiorari in this matter and then decide that the Arizona system is in compliance with Title VII as construed by *Los Angeles Department of Water & Power v. Manhart, supra,* 435 U.S. 702.

The Arizona system is structured as an equal contribution plan. The employee selects the amount to be paid into the plan and there is no difference with regard to sex.

This fact itself distinguishes this case from *Manhart*. In *Manhart,* the females actually had less take-home pay than their male counterparts because they were compelled to pay in greater amounts to pension system under attack. (*Manhart, supra,* 435 U.S. 702, 704, 705.)

This fact also distinguishes this case from *Women in City Govern. United v. City of New York* (S.D.N.Y., 1981) 515 F.Supp. 295. In that case, the plan utilized sex-differentiated actuarial tables to compute both contributions and benefits. (*Id.*, at p. 298.) As a result, a woman employee also had less take-home pay then her male counterpart.

Therefore, this case is neither *Manhart* nor *City of New York*. Without question, Arizona is in compliance with the "equal contribution" dictate of the *Manhart* case. The attack on Arizona's scheme is on an entirely different plane than *Manhart* and on a plane not sanctioned or indicated by *Manhart* or its progeny. Indeed, as developed below, *Manhart* itself seems to allow or permit the features complained of in this case.

Secondly, the benefits as they are paid out are squarely within the "open market" exception of *Manhart*.

In *Manhart,* the Court stated:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." (435 U.S. 702, 717-718.)

In effect, Arizona has done just this. The life annuities offered by the Arizona plan represent those available on the open market. Inasmuch as the parties stipulated at the trial court level that all insurance companies available to Arizona used sex-based mortality tables for their annuities, an employee could purchase no greater benefit on the open market than he could under Arizona's deferred compensation plan.

Therefore, this court should hold that the open market exception enunciated in *Manhart* controls this litigation.

Third, a prospective retiree may withdraw his/her contributions in a lump sum so that he/she may purchase the largest benefit available in the marketplace. This is exactly what this court sanctioned in *Manhart, supra,* at pages 717-718. Further, no one is "locked" into the system as was the case of *Peters v. Wayne State University* (E.D. Mich. 1979) 476 F.Supp. 1343, 1350.

Nonetheless, the Court of Appeals rejected the claim that the Arizona plan fell within the open market exception of *Manhart*. It ruled that although a lump sum option was available to employees to purchase the largest benefit which they could on the open market, Arizona was nevertheless liable because its plan also offered life annuities based on sex-based mortality tables. Although the life annuities simply reflected what was available on the open market, the Court of Appeals ruled that by offering the annuities as part of the plan, Arizona "discriminated" against women. (671 F.2d, at p. 335.)

Since Arizona offered only what the open market made available, it must be found to have satisfied the open market exception in *Manhart* if that exception is to have any meaning. The lump sum option was available to purchase anything desired on the open market and the additional option of life annuities simply gave employees the opportunity of further deferring their taxes.

Therefore, an important question has been raised. Does the Arizona plan comply with Title VII? The State of California joins with Arizona in asking this court to review whether the Court of Appeals' decision conflicts with *Manhart* by rendering meaningless the open market exception of *Manhart*.

II.

The Decision Below Is Revolutionary for the Insurance Industry.

In *Manhart*, at page 717, the following language is found:

> "(W)e do not suggest that the statute was intended to revolutionize the insurance and pension industries."

However, the decision in the court below will have the exact effect that this court warned about in *Manhart*. It is undisputed that women live longer than men. (*Los Angeles Department of Water & Power v. Manhart, supra,* 435 U.S. 702, 704, 707.) They outlive men at all ages. (*Peters v. Wayne State University, supra,* 476 F.Supp. 1343, 1347.)

That is the troublesome fact of life and like King Canute with his tides, this court and the insurance industry cannot ignore it. (*Equal Employment Opportunity Com'n v. Colby College* (1st Cir. 1978) 589 F.2d 1139, 1141.) The use of sex in mortality tables is not to use a social stereotype. It is the use of a fact. Women live longer than men.

The lower court's decision reflects a lack of appreciation with insurance mechanisms and principles. Whenever clas-

sifications are established, there will be differences among people within the particular classifications. That is the nature of classification or grouping. Only a relatively few persons in any class will die during a year. Only a relatively small percentage of *all* persons die during a year.

Classifications are not designed to predict an individual loss. Rather, they measure the loss potential of a group of persons with similar objective characteristics. With respect to any one individual, the fairness of a classification depends on characteristics rather than on experience, which is based to a degree on chance.

As explained by the National Association of Insurance Commissioners (NAIC) in its January 1978 presentation to Congress:

> "Insureds are grouped into classes to reflect essential differences in their actual or probable losses and expenses. An actuarially fair share is determined by reference to loss and expense experience of different classes (or individuals) *and by the expected effect of the insured's risk characteristics and underwriting factors* upon the insurer's costs. *It would be unfair discrimination from a statistical standpoint if the classes thus identified were not rated accordingly.*" (Emphasis added, *Statement on behalf of the NAIC* before the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee of the Judiciary, January 17, 1978.)

An attack on the use of the classification of sex is an attack on the insurance process itself. In any classification, there are individuals whose actual experience will differ from the norm. However, every insured should contribute his/her fair share toward the risk involved. Only individuals who are exposed to comparable degrees of risk should be placed in the same premium class.

Grouping people by class, whether it be age, occupation, sex, etc., will create subsidization of some by others. It is imperative, for the sake of fairness, that the subsidization is by persons having equal (or as nearly equal as practical) probability of loss. The difference between male and female mortality is too great to group together in a single class. The probability of males living as long as females is not equal or nearly equal.

Equity and fairness require that whenever a group is large enough to produce reliable data and shows costs different from another group, that group's own rates should be used.

Equity requires providing equal costs for equal risks. This in turn requires that equal classes be treated equally AND that unequal classes *not* be treated equally. It is just as discriminatory to treat unequal persons equally as it is to treat equal persons unequally.

When it comes to mortality rates (or life expectancy) there is no equality between men and women. They should not be treated as though this troublesome fact did not exist. Sex is an objective, demonstrably relevant factor in computing life expectancy. To ignore it is to ignore a reality.

The crux of the instant case is whether men and women, similarly situated, are treated differently by the Arizona p[illegible]

First of all, it is permissible to recognize the differences between the sexes. (*Schlesinger v. Ballard* (1975) 419 U.S. 498, 508; *Kahn v. Sherin* (1974) 416 U.S. 351.)

But the real point is that men and women are not and cannot be "similarly situated" because nature has afforded women a longer life expectancy. A 60-year-old man and a 60-year-old woman are *not* similarly situated. She is expected to outlive him by three to five years. Of course, she may perish tomorrow and he may live to be 90 before he

dies, but any insurance-type system is based upon group principles. No one knows *who* will die tomorrow, but a very accurate estimate can be made as to *how many* people will die tomorrow. Arizona did not give its women employees a longer life expectancy and the insurers did not create the fact of lower female morality. Nature did and Arizona should be allowed to recognize a fact that everyone concedes to be true.

To restate the obvious, Arizona does not discriminate against women. Nature has done the discriminating because women, at all ages, outlive their male counterparts. Arizona's use of sex-based tables does not create any discrimination. It just reflects the existing reality.

To illustrate, if we were discussing fire insurance, we would want to know whether a brick building or a wooden building was more fire resistant when setting the insurance rates to be extracted for a certain pay-off. All things being fair and equal, we would not want to charge the owner of a more fire resistant building the same rate as we would charge the owner of the building more likely to catch fire.

The claim is made that unisex tables should be used by the insurance and pension industry. Many "no-sex-unisex" proponents contend that the reason there are different monthly pension benefits for the sexes results from the operation and working of dual mortality tables. This is not true. The real cause for the differences is not the dual mortality tables, but the dual mortality. If the sexes did not have different genetic characteristics and different biological makeups, there would be no differences. It is not the sexes themselves, but the characteristics that those sexes have that make the differences. A "no-sex-unisex" table merely gives the *appearance* that there is one mortality basis, one set of probabilities.

The facts are that the mortality basis for the sexes are different. A "no-sex-unisex" table would substitute appearance for facts.

Therefore, the decision below would "revolutionize" the insurance industry. Before any such drastic change in such a vital industry is compelled by judicial order, this court should grant the petition for writ of certiorari on file herein to review this case and the application of *Manhart*.

Conclusion.

For the foregoing reasons, amicus urges this court to grant the Petition for Writ of Certiorari filed by the State of Arizona and Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans.

Dated: September 1, 1982.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarily situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS

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INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners (NAIC) is an unincorporated association whose membership consists of the principal state regulatory officials charged by law with the responsibility of regulating the business of insurance within each state, the District of Columbia, Guam, Puerto Rico and the Virgin Islands. The NAIC submits this *amicus curiae* brief with the consent of all parties to this case.

The individual state insurance commissioners who comprise the NAIC and the insurance consuming public, on whose behalf they regulate, have a vital interest in the granting of this petition. The Ninth Circuit Court of Appeal's decision blurs the jurisdictional lines between state regulation of the insurance industry under state insurance laws and federal regulation of the employment practices of employers under Title VII of the Civil Rights Act of 1964.

The NAIC asks this Court to review the Ninth Circuit holding so as to provide NAIC members with certainty regarding Title VII's potential impact on the regulation of the business of insurance

ISSUE PRESENTED

Should this Court issue a writ of certiorari to review the Ninth Circuit opinion in the instant case in order to resolve the difficulties in applying *Manhart* and thereby prevent the blurring of jurisdictional lines between state and federal regulation of the insurance industry?

SUMMARY OF ARGUMENT

The decision in the instant case reflects the tendency of lower courts to extend the holding of *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), to include the application of the *Manhart* rationale to situations in which the employer does not self-insure, but does participate in the insurance plan offered its employees. This extension of *Manhart* blurs the jurisdictional lines between the operation of state regulation of insurer solvency and federal regulation of the employment practices of employers under Title VII of the Civil Rights Act of 1964.

The McCarran-Ferguson Act dictates that NAIC members regulate private insurance companies engaged in the "business of insurance." Thus, private insurers are exempt from Title VII liability unless they are both functioning as employers within the meaning of the federal statute, and are also engaged in activities other than the "business of insurance." Private insurers qualifying for this exemption must follow the various state laws to satisfy the state insurance commissioners (NAIC members) that their company practices are financially sound. If the company takes on more of the characteristics of an "employer" under Title VII than of an insurer engaged in the "business of insurance," then Title VII applies. The Title VII requirements, however, are not consistent with state insurance regulations with regard to the use of sex-distinct mortality tables for the determination of the cost and benefit levels of pensions and annuities.

Thus, a conflict exists between state and federal regulations. Some entities, because they have characteristics of both state regulated insurers and Title VII employers, fall in a jurisdictionally gray area. The NAIC supports

the granting of a writ of certiorari in the instant case because its members have a strong interest in knowing for certain the exact span of their jurisdiction.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This Court Should Resolve the Difficulties in Applying *Manhart* and Thereby Prevent the Blurring of Jurisdictional Lines Between State and Federal Regulation of the Insurance Industry.

Congress established the jurisdictional lines between state and federal regulation of the insurance industry by the passage of the McCarran-Feguson Act. The Ninth Circuit Court of Appeals decision in the instant case blurs these jurisdictional lines between the operation of state regulations concerning insurer solvency and federal regulations regarding employment practices of employers under Title VII of the Civil Rights Act of 1964.

The decision in the instant case reflects the tendency of lower courts to extend the holding of *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978), to include the application of the *Manhart* rationale to situations in which the employer does not self-insure, but does participate in the insurance plan offered its employees. *Manhart* prohibits employers, under Title VII, from treating individual employees as members of a sexual class even though the higher costs for female annuities are based on women's greater longevity as a class. That is, even though a sex-based mortality table produces an annuity program that is actuarially sound, an employer may not use such a table in the computation of costs and benefits in its self-insured employee benefit program.

Manhart involved a self-insured employer and thus presented few potential conflicts with state insurance regulation of insurance companies. In contrast, subsequent lower court cases have presented such conflicts because they require application of the *Manhart* rationale to situations in which the employer is not self-insured but does participate to some degree in selecting and administering the pension and annuity plans offered its employees from private state-regulated insurance companies.

The rationale used in *Peters v. Wayne State,* 476 F. Supp. 1343 (E.D. Mich. 1979), appeal pending, No. 79-1676 (6th Cir.), is typical of these cases. The district court held that the service organization created to administer employee annuity contracts "is so intertwined with the institutions it serves that it more resembles an employer than a company engaged in the 'business of insurance.'" 476 F. Supp. at 1351. To the same effect are *Henderson v. Oregon,* 405 F. Supp. 1271 (D. Ore. 1975) and *Spirt v. Teachers Insurance and Annuity Assn.,* 93 F.R.D. 627 (S.D.N.Y. 1982); 475 F. Supp. 1298 (S.D. N.Y. 1979). Thus the application of the *Manhart* rationale has gone well beyond the self-insurance arrangement involved in that case.

This Court in *Manhart* expressed the firm resolve not to "revolutionize the insurance and pension industries." 435 U.S. at 707. However, as noted by the court in *EEOC v. Colby College,* 589 F. 2d 1139 (1st Cir. 1978), there are "possibly very great difficulties, that did not arise in *Manhart*" which do arise when the *Manhart* rationale must be applied to situations in which the employer does not self-insure, but does participate in the plan offered its employees. The *Colby* court interpreted the *Manhart* decision to dictate the use of a unisex rate in the determination of pension costs and benefits in employer-spon-

sored annuity plans. The court then pointed out the difficulties determining "[w]hether, or how, unisex insurer-operated plans can be achieved without revolutionizing the industry . . ." 589 F. 2d at 1146. Similarly, in *Sobel v. Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979), the district court referred generally to these problems as "vexing" and specifically detailed the "complex problem of applying *Manhart* to a plan funded through a private insurance company in a manner which is both consistent with that decision, and yet can be realistically carried out by the insurance industry." 477 F. Supp. at 1166.

The difficulties alluded to in these lower court decisions stem from the jurisdictional problem. Jurisdictional lines between state and federal regulation of the insurance industry were drawn by Congress in the McCarran-Ferguson Act. In *SEC v. National Securities* this Court said:

> The statute [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers to laws 'regulating the business of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply. 393 U.S. 453, 459 (1969).

The McCarren-Ferguson Act dictates that NAIC members regulate private insurance companies engaged in the "business of insurance." Thus, private insurers are exempt from Title VII liability unless they are both functioning as employers within the meaning of the statute and are engaged in activities other than the "business of insurance." This Court in *Manhart* expressed a clear intent not to blur the jurisdictional lines between state and federal regulation. *Manhart* was not to "revolutionize the insurance and pension industries." 435 U.S. at 717.

Since *Manhart* lower courts have found it necessary to decide whether entities "more resemble an employer than a company engaged in the 'business of insurance.'" 476 F. Supp. at 1351. The resolution of this question requires clearly deliniated lines as to which systems of regulation, state or federal, applies to a given employee annuity plan. For example, plans that have characteristics of both "employers" under Title VII and companies engaged in the "business of insurance" under the McCarran-Ferguson Act are subject to potential conflicting regulations. If such an entity is subject to Title VII, it will have to disregard actuarial experience in computing annuity and pension costs and benefits. If the entity is subject to state regulation as an insurance company engaged in the "business of insurance," it must follow the state laws to satisfy the state insurance commissioners that its practices are financially sound. Those regulations are not necessarily consistent. A good example of the problem is presented in *Spirt v. Teachers Insurance and Annuity Assn.*, 93 F.R.D. 627 (S.D.N.Y. 1982) and 475 F. Supp. 1298 (S.D.N.Y. 1979). The insurer (TIAACREF) in the course of settlement negotiations agreed to adopt mortality tables that would eliminate sex-based differentiation in the benefits received by plan participants. However, the details are yet to be worked out. The EEOC and the New York Superintendent of Insurance have examined three different proposed unisex tables and failed to agree. The EEOC claims violation of Title VII and the Equal Pay Act, and the State of New York claims violation of New York Insurance Law. 93 F.R.D. at 632-633. An appeal is pending.

CONCLUSION

In summary, a conflict exists between state and federal regulations affecting the use of sex distinct mortality tables by insurers. The NAIC asks this Court to grant a writ of certiorari to review the Ninth Circuit opinion in the instant case, and thereby resolve the difficulties in applying *Manhart* to prevent the blurring of jurisdictional lines between state and federal regulation of the insurance industry.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. Was it a violation of Title VII, under the reasoning of *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), for the State of Arizona to contract with independent insurance companies which used sex-based actuarial tables for the purpose of giving its employees the option of receiving their deferred compensation in the form of annuity payments, even though:

(a) the employees could elect to receive their deferred compensation in a lump sum and purchase the largest benefit which their accumulated contributions could command on the open market;

(b) all of the insurance companies which were available to the State of Arizona to provide such life annuities used sex-based mortality tables and therefore Arizona had no choice but to offer sex-based life annuities if that option was to be offered at all; and

(c) the district court found that Arizona had no intent to discriminate because the sex-based actuarial tables were the result of the judgment of the insurance companies?

2. Was it an abuse of discretion for a federal court to order the State of Arizona to supplement the future life annuity payments paid by independent insurance companies to female employees in order to make them equal to those made to similarly situated male employees:

(a) where the state legislature explicitly provided that no contribution was to be made by the state to the deferred compensation plan; and

(b) where the state was not responsible for the establishment or use of actuarial tables upon which the independent insurance companies based these life annuities?[1]

---

[1] Petitioners have decided not to raise the issue set forth in their Petition for Writ of Certiorari as to whether the relief violates the Tenth Amendment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are Nathalie Norris, on behalf of herself and all others similarly situated, plaintiff-appellee; Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, the State of Arizona, and Richard Rabago, Margaret Griffith, Ted Williams, Russ Webb, Walter Madsen, Dave Conner, and Jack La Sota in their capacity as members of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, defendants-appellants below.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONERS

Petitioners, State of Arizona ("Arizona"), Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Governing Committee") and the individual members thereof in their official capacity, respectfully submit this brief in support of their position that the judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") entered in the above-entitled case on March 11, 1982, should be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 330 (9th Cir. 1982) (Appendix A to the Petition for Writ of Certiorari). The opinion of the United States District Court for the District of Arizona entered March 12, 1980 is reported at 486 F. Supp 645 (D. Ariz. 1980) (Appendix B to the Petition).

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1982. The Petition for Writ of Certiorari was timely filed in accordance with the Order of Justice Rehnquist dated May 13, 1982, which extended the time for filing the petition to and including July 12, 1982. The petition was filed on July 12, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves several provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a), and Sections 38-871 to 38-874 of the Arizona statutes.

Title VII of the Civil Rights Act of 1964, as amended, provides in the relevant section:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . .

42 U.S.C. Section 2000e-2(a)(1)

A.R.S. Sections 38-871 to 38-874 have been printed in full in Appendix C of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I. Description Of The Plan.

If any deferred compensation or retirement plan should be held not to violate this Court's decision in *Manhart*[2], the Arizona plan involved here is it. The deferred compensation plan held unlawful under Title VII by the courts below permitted each employee to defer whatever portion of his or her compensation he or she chose and thereafter to recover the full amount upon retirement (1) in a lump sum so that the retiree could purchase "the largest benefit which his or her accumulated contributions could command in the open market," *see Manhart, supra,* 435 U.S. at 717-18; (2) in a fixed monthly amount over a specified period of time; or (3) in the form of a life annuity with the monthly payments being made by an independent insurance company. (J.A. 7-10) The employer, the State of Arizona, made no contributions. (J.A. 6-7) The courts below held the plan unlawful under Title VII because the amount of the monthly annuity payments under the life annuity option were calculated by the insurance companies on the basis of sex-distinct mortality tables. However, all of the insurance companies which were available to Arizona to provide life annuities used such sex-based mortality tables. (J.A. 10; R.11) If *Manhart* is extended to cover such a situation, then this case not only has serious consequences for many employers, but it will also revolutionize the insurance and pension industries.

In 1972, the State of Arizona enacted A.R.S. Sections 38-871 through 38-874 which established a Governing Committee for the purpose of establishing a deferred compensation plan.[3] In contrast with Arizona's separate and mandatory retirement plan[4], the purpose of the voluntary deferred com-

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[2] *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702 (1978).

[3] There is no attack on the statutes which established the deferred compensation plan nor on the plan itself, but only on one of the options selected by the Governing Committee, the life annuity option.

[4] Arizona has an entirely separate and independent state retirement plan. See A.R.S. §§ 38-741 through 38-781.36, as amended. The retirement plan is mandatory, and contributions and benefits are equal for similarly situated males and females.

pensation plan is solely to enable state employees to defer the receipt of a portion of their compensation until a later date to obtain tax benefits. Accordingly, the plan is financed solely through the employees' deferment of their income; there are no employer contributions to the plan. (J.A. 6-7) Indeed, the Arizona statute expressly provides that the plan is to operate without cost to the State:

> The Governing Committee shall:
>
> > (1) Arrange for consolidated billing and efficient administrative services in order that any such plans approved shall operate *without cost or contribution from the state* except for the incidental expense of administering the payroll salary deduction or reduction and remittance thereof to the trustee or custodian of the plan or plans.

A.R.S. § 38-871 C.1 (emphasis added).

The plan is offered to all state employees (approximately 35,000) on a voluntary basis. (J.A. 6) As of August 18, 1978, there were 1,675 employees who chose to participate in the plan, of whom 681 were women. (J.A. 6)

The deferred compensation plan works in two phases. During the first or "accumulation" phase, employees are free to choose from a wide variety of investments selected by the Governing Committee into which their deferred compensation can be directed, including savings accounts, mutual funds, life insurance, or annuities. The companies chosen have included Lincoln National Life Insurance Company, National Investors Life Insurance Company, Valley National Bank of Arizona, Variable Annuity Life Insurance Company, the Hartford Insurance Company, ITT Life Insurance Corporation, Keystone B4 Mutual Fund, and the Arizona State Employees Credit Union (which replaced the Valley National Bank). (J.A. 7-9) If the employee desires to change the investment into which his or her deferred compensation is directed, the employee is free to do

so. Amounts contributed by a male or female employee to the same investment earn income at the same rate. There has been no attack on this phase of the plan.

During the second or "pay-out" phase, usually at retirement, the employee can elect to recover the full amount of the deferred compensation through a variety of means: the employee can elect to have his deferred compensation and earnings thereon paid to him (1) in a lump sum, (2) in a fixed monthly sum over a specified period of time, or (3) in the form of a life annuity. (J.A. 7-10)

Regardless of the original choice of investment, an employee is free to make an entirely different election as to what form of benefits to receive at the time he or she becomes eligible for them. (J.A. 11)

What the respondent is complaining about is the result produced by voluntarily exercising that pay-out option which gives her back her deferred compensation in the form of a life annuity provided by an independent insurance company. All of the insurance companies available to the State of Arizona use sex-based actuarial tables to calculate the amount of monthly annuity payments to be made over an employee's expected lifetime. (J.A. 10) This results in lower monthly payments to female employees because the monthly payments to a woman are expected to be made over a longer period of time than to a man since every woman has the same probability of outliving a man of the same age.[5]

Accordingly, even though the amount expended to purchase the annuity is equal for similarly situated male and

[5] For instance, in the case of the respondent, assuming that she does not change the amount which is being deferred by her and that she does not change her election to invest her deferred compensation in the fixed annuity contract offered by Lincoln National Life Insurance Company, the total value of her account at age 65 would be $53,890.93—the same as a similarly situated male—but her annuity payment paid by Lincoln National Life would be $320.11 per month for her life, whereas the annuity payment for the male would be $354.06 per month for his life. (J.A. 12) Whether the respondent or a similarly situated male employee will receive more total retirement income will depend on their respective longevity.

female employees, and even though the amount of the monthly annuity payment is determined by the independent insurance carriers (over which petitioners have no control), respondent argues that the differential in monthly benefits *paid by the independent insurance carriers* constitutes illegal discrimination *by her employer.*

II. The Proceedings Below.

On May 3, 1975, the respondent Nathalie Norris, an employee of the State of Arizona in the Department of Economic Security, made an application to the Governing Committee to participate in the deferred compensation plan. She requested that her contributions be invested in the fixed annuity contract offered by Lincoln National Life Insurance.[6] Two days later she filed charges with the EEOC complaining about the plan.

On April 25, 1978, respondent, on behalf of herself and the class of females now or in the future enrolled in the deferred compensation plan, brought an action against petitioners, alleging that the differential in monthly benefits produced by the life annuities for men and women constituted a violation of Title VII by her employer by reason of this Court's decision in *Manhart,* as well as a violation of the Fourteenth Amendment. Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1343.

Both parties moved for summary judgment in the district court on the basis of a joint statement of stipulated facts. (J.A. 4 *et seq.*) The district court determined that petitioners were in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e *et seq.,* on the ground that the benefits paid by the insurance companies under the life annuity option were determined on the basis of sex-based mortality tables and were thus unlawful under the *Manhart* decision. However, the district court specifically found that Arizona and the Governing Committee did not purposefully

[6] The plaintiff is currently deferring $199.50 per month into the plan. (J.A. 11)

discriminate against female employees so as to violate the Fourteenth Amendment and dismissed that claim. The district court enjoined petitioners from carrying out their obligations under the deferred compensation plan through the use of sex-based actuarial tables and directed that future annuity payments to retired female employees be made equal to those for similarly situated male employees. Petitioners timely appealed the decision, and the Court of Appeals affirmed the judgment.

The inevitable result of this decision has been to force petitioners to remove the life annuity option from the available offerings pending a final decision of this issue. Now none of the present state employees, male or female, can select the life annuity option and all are thus equally treated. Only those female employees who have already retired and selected the life annuity option can be said to have been benefited by this decision. The active employees who have lost the option of a life annuity are the losers.

SUMMARY OF ARGUMENT

In *Manhart*, this Court held that the "requirement that men and women make unequal contributions to an employer-operated fund" violated Title VII, but warned that Title VII was not intended to revolutionize the insurance and pension industries.

The State of Arizona, the employer in this case, does not require unequal contributions or make unequal payments. It has simply withheld payment of wages in the amount directed by its employees to enable them to obtain tax-deferred treatment of the amount withheld, and has offered a variety of investments through insurance carriers and other organizations into which the deferred compensation can be placed for interim growth and later be recouped. One option of recoupment is for the employees to contract with one of the insurance carriers for a life annuity. The private, independent insurance carriers are

responsible for the payment of the monthly annuity benefits, which they calculate on the basis of sex-distinct actuarial tables, as permitted by state law.

Accordingly, the State of Arizona has not discriminated against anyone on the basis of sex. Respondent is attempting to hold Arizona liable under Title VII because the private insurance carriers use sex-based actuarial tables. Since all insurance carriers available to Arizona use sex-based actuarial tables, Arizona had no choice but to offer sex-based annuities if it was to offer them at all. This cannot constitute a violation of Title VII because, unlike the employer in *Manhart* which was responsible for the requirement that women contribute more to the pension fund than men, Arizona is not responsible for the calculation or payment of the unequal monthly benefits by the insurance companies. Recent decisions of this Court evidence that an employer, or other defendant, will not be held to have discriminated against women because of conditions or obstacles in the marketplace, which conditions or obstacles were not created by the employer or defendant. *See, e.g., Harris v. McRae,* 448 U.S. 297 (1980); *General Electric Co. v. Gilbert,* 429 U.S. 125, 139 (1976).

Indeed, the open market exception recognized by this Court in *Manhart* acknowledges that an employer should not be subjected to liability because of the fact that a female cannot purchase as large a benefit as a male employee from companies in the open market. The Court carefully stated that nothing in its holding "implies that it would be unlawful for an employer to set aside equal retirement contributions . . . and let each retiree purchase the largest benefit" possible on the open market. 435 U.S. at 717-718. Since Arizona not only grants its employees the option of receiving their compensation in a lump sum and then purchasing the largest benefit available on the open market, but also offers employees a variety of life annuities which reflect those available on the open market, Arizona must be held to come within the open market exception pronounced in *Manhart.*

Furthermore, since Arizona had no choice but to offer life annuities based on sex-distinct actuarial tables if it was to offer them at all (since all available insurance carriers used them), it had no intent to discriminate against females. It offered life annuities "despite" the insurance carriers' use of sex-based actuarial tables, not "because of" them. Indeed, the district court held that Arizona had no discriminatory motive. Since proof of discriminatory intent is critical in proving liability under Title VII for discriminatory treatment, its absence requires reversal of the judgment against petitioners. *See, e.g., Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Moreover, an affirmance of the Court of Appeals' decision here would cause Title VII to "revolutionize the insurance and pension industries," a result this Court excluded in *Manhart.* If employers are held liable for the practices of insurance carriers, then many employers will, as Arizona has already done, cease to offer life annuities to their employees, profoundly affecting the insurance and pension industries.

Finally, the lower court's order directing petitioners to compensate female employees such that their benefits be equalized to those of males was in error. By statute, Arizona was not to contribute to the deferred compensation plan; employees simply contributed that portion of their income which they desired to defer. The instant order constituted an abuse of discretion by imposing damages upon a party which was not responsible for the unequal benefits and whose legislature had made a non-discriminatory judgment that the plan was to be "without cost" to the state.

ARGUMENT

I

UNDER THE REASONING OF THIS COURT'S DECISION IN *MANHART*, PETITIONERS WERE NOT LIABLE UNDER TITLE VII.

The Court of Appeals in the instant case concluded that "Arizona's plan is unlawful under *Manhart*." *Norris v. Arizona Governing Committee*, 671 F.2d 330, 336 (1982). However, *Manhart* is not only distinguishable from the instant case, but the express reasoning of this Court in *Manhart* demonstrates that petitioners should not have been held liable under Title VII.

In *Manhart*, the employer required female employees to make monthly contributions to a retirement fund which were 14.84% higher than the contributions required of comparable male employees because as a class women live longer than men, and, therefore, more monthly payments could be expected to be made to the average woman than to the average man. Since the employees' contributions were withheld from their paychecks, a female employee took home less pay than a male employee earning the same salary. This Court held that the employer's conduct violated Title VII because that statute "precludes treatment of individuals as simply components of a racial, religious, sexual or national class." 435 U.S. at 708.

However, the decision in *Manhart* was quite narrow. No private insurance companies were involved. This Court expressly limited its holding of a violation of Title VII to "an employer-operated pension fund" and stated that it was not suggesting that Title VII was intended to revolutionize the insurance and pension industries:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund.

435 U.S. 702, 717.

A. In The Instant Case, Unlike *Manhart*, Independent Insurance Companies, Not The Employer, Treated Females Differently On The Basis Of Sex

Unlike *Manhart* where the employer was responsible for requiring the unequal contributions on the basis of sex, in the instant case Arizona is not responsible for the insurance carriers' use of sex-based actuarial tables which determine the size of the monthly benefits which they pay each beneficiary. Moreover, here, no contributions are *required* at all. A State of Arizona employee is free to choose to defer a portion of present salary. If the employee chooses to use the sum total to purchase a life annuity from a private insurance company, a similarly situated man will receive greater monthly payments than a woman. However, as was found by the district court, this classification was one of the insurer's judgment, not the defendant's.

Additionally, in the instant case, all insurance companies available to contract with Arizona used sex-based mortality tables to calculate payments to pay life annuities. (J.A. 10) Accordingly, Arizona had no choice, if it was to offer life annuities, but to offer annuities based on sex-distinct mortality tables.

Hence, unlike *Manhart* where *the employer* required female employees to contribute more than males, a practice this Court found discriminatory, in the instant case the employer has not discriminated. Respondent's complaint really challenges the practices of the non-party, independent insurance carriers which uniformly used sex-based actuarial tables. The simple act of Arizona's offering its employees an option to elect to receive deferred compensation in the form of life annuities from various insurance companies which used sex-based tables does not amount to employer use of sex-based actuarial tables.

Recognizing this dilemma, the Court of Appeals cited this Court's language in *Manhart* that an employer cannot avoid his responsibilities "by delegating discriminatory programs to cor-

porate shells" because Title VII applies to any agent of a covered employer, 435 U.S. at 718 n.33. It then concluded that "[t]he reasoning of *Manhart* is no less persuasive where, instead of operating a plan itself, an employer designates certain companies to operate the plan." *Norris*, 671 F.2d at 334.

However, there was nothing in the record which indicates—nor could there be—that the independent insurance carriers here, like Lincoln National Life Insurance Company and Hartford Insurance Company, are corporate shells. Nor can they properly be considered "agents" of Arizona since the essence of the principal-agent relationship is the principal's power to control the activities of the agent. *See General Building Contractors Association, Inc. v. Pennsylvania*, ___ U.S. ___, 102 S.Ct. 3141, 73 L.Ed. 2d 835 (June 29, 1982); *Peters v. Wayne State University*, ___ F.2d ___, No. 79-1658, -1670, -1671 (6th Cir. October 14, 1982). They are independent contractors selected after competitive bidding. A.R.S. § 41-730.

In *Peters v. Wayne State University, supra*, the Sixth Circuit held that the Teachers Insurance and Annuity Association (which was a legal reserve life insurance company providing a retirement plan for employees of Wayne State University) was not an agent of Wayne State University because "Wayne State exercises no control over Teacher's Annuity, otherwise essential to a principal agent relationship." Slip op. at 4.[7] In *General Building Contractors Association, Inc. v. Pennsylvania, supra*, 73 L.Ed. 2d 835, this Court held that a union which operated a discriminatory hiring hall, which hall only came into existence by agreement with the employers' trade associations, was not the agent of the associations or of the employers because (1) essential to the establishment of agency was the principal's right to control the physical activities of the servant, and (2) the power to *oppose* the union was not tantamount to the right to *control it*. 73 L.Ed. 2d at 851.

[7] *But see Spirt v. Teachers Insurance and Annuity Association*, ___ F.2d ___, Nos. 79-7715, -7737, -7739 (2d Cir. September 29, 1982) (holding that insurers in that case were "so closely intertwined" with the employer that they could be deemed agents).

Likewise, in the instant case, petitioners do not have the right to control the activities of the independent insurance companies; their power, if any, to oppose the insurance companies is not tantamount to the right to control them.

Accordingly, Arizona's plan is not unlawful under the reasoning of *Manhart*. Arizona is not responsible for the use of the sex-based actuarial tables by the independent insurance carriers which results in the disparate monthly benefits for similarly situated males and females. The insurance carriers cannot be considered either a corporate shell or an agent of the petitioners such that the petitioners are responsible for the practices of the latter. The instant case would attempt to hold petitioners liable for the use of sex-based distinctions by insurance companies simply because the employer made the services offered by the insurance carriers available to its employees. Neither *Manhart* nor common sense holds that offering an employee the opportunity to deal with a third party is "discriminating against" an employee.

B. The Instant Plan Falls Squarely Within The Open Market Exception Stated In Manhart And Is Therefore Lawful.

In *Manhart*, this Court stated:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-718.

There are two reasons why the instant case falls squarely within the open market exception stated by this Court in *Manhart*. First, employees have the option of receiving their deferred compensation in the form of a lump sum so that they can "purchase the largest benefit which [their] accumulated contributions could command in the open market."

Second, even if an employee does not choose to exercise the right to receive deferred compensation in the form of a lump sum, the life annuities offered by the insurance carriers through Arizona's plan exactly reflect what is available in the open market. Since it has been stipulated that all insurance companies available to Arizona use sex-based mortality tables in calculating their annuities, an employee could purchase no greater benefit on the open market than he could through the companies participating in Arizona's deferred compensation plan.

Without citing any authority, the Court of Appeals rejected petitioners' position that the plan falls within the open market exception on the grounds that although the lump sum option treats men and women the same, "Arizona has also offered a benefit which favors men" and "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." 671 F.2d 330, 335.

However, since all employees have the option of receiving their deferred compensation in the form of a lump sum, petitioners should be found to have satisfied the open market exception. The reason that petitioners also offered various life annuities provided by various companies as a part of the plan was because the lump sum would be subject to tax at the time of payment, thereby reducing the amount available with which to purchase an annuity. This additional option permitted employees to purchase life annuities using the full amount of their deferred compensation.[8]

In effect, the Court of Appeals' ruling means that the only way by which petitioners could qualify for the open market exception would be to force their employees to take their deferred compensation in a lump sum, which would then be subject to tax, and use the remaining money to purchase the

[8] See Rev. Ruling 68-99 and 72-25, I.R.C. Bulletins 1968-1 and 1972-1, respectively.

same type of annuities on the open market which petitioners could directly offer the employees through the plan without subjecting them to the immediate tax.

The courts below apparently assumed (contrary to the record) that if respondent had been free to go into the "open market" and had had an unlimited selection from the available insurance companies, she could have found a life annuity that was not based upon a sex-based actuarial table and which would have paid her the same amount as a male. However, as hereinbefore set forth, the record in this case establishes that "all tables presently in use provide a larger [monthly] sum to a male than to a female." (J.A. 10) Therefore, the choices available to the respondent under the Arizona plan are equivalent to those offered on the open market and do not result in a "benefit which favors men" in a prohibited way. *Manhart's* open market exception should not be read to mean that an employer can qualify for the exception only if it subjects its employees to the tax consequences of receiving their contributions in a lump sum which reduced amount is then used to purchase benefits on the open market but that it cannot offer them the option of directly purchasing that exact annuity thereby avoiding the tax consequences.[9]

Petitioners have done no less than required by this Court in *Manhart* to qualify for the open market exception: Petitioners "set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-718. It is submitted that the questioned option is in fact an "open market" purchase by the employee, for it cannot occur without employee choice and direction. The fact that Arizona granted the additional tax benefit of permitting employees to transmit their deferred income directly to independent insurance companies which were available and

[9] Also, by purchasing a life annuity through the plan the employee gets the benefits of being part of a group which results in greater annuity dollars per dollar of investment. If forced to purchase the annuity individually with a lump sum payout, the employee gets less for his or her dollar.

willing to contract with petitioners does not restrict the freedom of choice upon which the open market exception is based. Respondent has nowhere indicated that her freedom to purchase the largest benefit which her accumulated contributions could command on the open market was in any way restricted by petitioners' plan.

None of the other cases in which the lower courts have held pension or retirement plans violative of Title VII on the basis of unequal benefits, has provided the same freedom of choice or so perfectly reflected the open market as the instant plan does.[10] To the contrary, the concurring opinion in *Equal Employment Opportunity Commission v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), recognized that such freedom of choice as exists here could be a critical difference in determining liability. In that case, Chief Judge Coffin stated that he was not certain that under *Manhart* an employer could *never* offer a benefit plan using sex-based mortality tables, and that a plan with genuine employee options (as in the instant case) might legally include unequal, actuarially sound pension and life insurance benefits:

> The plan that is before us, as I see it, fails because it is as if the company paid its male and female employees equal salaries, but in the form of chits, that could be redeemed only in a particular store which, the company knew, would give to one sex more for the same number of chits than to the other sex. . . . Perhaps, however, once they turn their attention to the problem, the parties could work out a system permissible under *Manhart* that would elimi-

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[10] *E.g., Spirt v. Teachers Insurance and Annuity Association*, ___ F.2d ___ Nos. 79-7715, -7737, -7739 (2d Cir. 1982) (no options available, participation in TIAA-CREF plans was mandatory); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (no options available; employees were required to participate in plans provided by TIAA-CREF); *Hannahs v. Teachers Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981) (participation in retirement plan was mandatory); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981) (employees were required to join the plans offered by the retirement system); *Henderson v. State of Oregon*, 405 F. Supp. 1271 (D. Ore. 1975) (all employees were required to contribute to the fund).

> nate the chit-like nature of the contributions through a set of genuine employee options or other features. If so, perhaps the system could legally include unequal, actuarially sound pension and life insurance benefits for participating men and women.

589 F.2d at 1146 (concurring opinion).

Hence, the Arizona plan's provisions for 1) payment of a lump sum by which employees can purchase the largest benefit available on the open market and 2) a meaningful range of options which exactly reflect the open market, so that employees can avoid being subjected to taxation on their lump sum, place this action within the open market exception provided by *Manhart*.

II

PETITIONERS CANNOT BE HELD LIABLE UNDER TITLE VII FOR PRACTICES IN THE MARKETPLACE OVER WHICH THEY HAVE NO CONTROL

Since all actuarial tables in use by the insurance industry were sex-based (J.A. 10), if Arizona was to offer a life annuity option to its employees at all, it had no choice but to offer life annuities based on the sex-based mortality tables utilized by the insurance industry.

Recent decisions of this Court evidence that a defendant will not be held to have discriminated against women because of conditions or obstacles which exist in the marketplace, which were not created by the defendant and over which it had no control. *See Harris v. McRae*, 448 US. 297 (1980); *Los Angeles Department of Water and Power v. Manhart, supra*, 435 U.S. 702; *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 139 (1976). Furthermore, this Court has held that the employer or defendant had no obligation to additionally compensate women because of those conditions or obstacles. *Id.*

In *General Electric Co. v. Gilbert, supra,* this Court held that the exclusion of coverage in General Electric's disability plan for disabilities arising from pregnancy did not constitute prohibited sex discrimination in violation of Title VII. In so ruling, this Court expressly recognized that the employer was not responsible for the fact that coverage for pregnancy would impose an additional cost for the coverage purchased on the open market. The employer's mere failure to purchase that additional coverage for females was therefore not prohibited discrimination:

> If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the "insurance," there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the "extra" disabilities due to pregnancy . . . . Title VII's proscription on discrimination does not, in either case, require the employer to pay that incremental amount.

429 U.S. 125, 139 n.17.

Likewise, in *Manhart,* this Court suggested that the fact that a female could not purchase as large a benefit as a male employee on the open market should not subject the employer to liability under Title VII or require it to additionally compensate her:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. 702, 717-718.

In *Harris v. McRae, supra,* 448 U.S. 297, this Court considered, *inter alia,* whether the Hyde amendment, by denying public funding for certain medically necessary abortions, contravened the Due Process Clause of the Fifth Amendment. Again, it explained that while the state itself may not impose obstacles in the exercise of a woman's freedom of choice, it need not remove those obstacles not of its own creation:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher:* although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.

448 U.S. at 316.[11]

Similarly, this Court in *Nashville Gas Co. v. Satty,* 434 U.S. 136, 142 (1977), expressly recognized that while Title VII did not allow an employer to place a burden on female employees because of their differing role in life, an employer is not required because of Title VII to provide greater economic benefits to one sex over the other because of those differing roles. It therefore held that an employer did not violate Title VII by its practice of giving sick pay to all employees disabled by reason of nonoccupational sickness or injury but not to those disabled by pregnancy. Likewise, here, petitioners do not place

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[11] The Court of Appeals attempted to distinguish *Harris v. McRae* on the grounds that there the state refused to remove an obstacle to an indigent woman's exercise of her right to obtain an abortion, whereas here, Arizona "affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against women." The distinction is semantical, not real. Arizona's plan did not affirmatively impose a burden; it merely set aside equal contributions and made available what the marketplace had to offer. In both *Harris* and the instant action, the plaintiff expected the state to additionally compensate her for a condition not of the state's creation: in *Harris,* the condition was her indigence; here, the insurance company's use of sex-based actuarial tables.

burdens on women, for all similarly situated employees may make equal contributions to the plan. However, Arizona does not violate Title VII because it does not make additional contributions to women to compensate for the fact that insurance companies calculate their monthly annuity benefits at a lower rate because of their greater expected longevity.

The foregoing cases demonstrate that an employer will not be held to have discriminated because of conditions or obstacles which it did not create and over which it had no control. In each case, this Court distinguished between the imposition of burdens or obstacles by an employer which discriminate against a group, and an employer's mere failure to take affirmative action to eliminate discrimination not of its own making. *Cf. General Building Contractors Association, Inc. v. Pennsylvania, supra,* 73 L.Ed.2d at 853 (employers not liable under 42 U.S.C. § 1981 where they "merely failed to ensure that plaintiffs enjoyed employment opportunities equivalent to that of whites" and did not intentionally discriminate themselves against plaintiffs).

In the instant case, Arizona did not impose any burdens on or place obstacles in the way of its female employees. Contributions for similarly situated employees were equal and the actuarial value of their deferred compensation at the time benefit rights accrue was the same. Having treated its employees equally, it only refrained from additionally compensating females to make up for the fact that all insurance carriers in the open market required from them a greater initial payment for identical monthly benefits than they do from men. Like *General Electric Co. v. Gilbert* and *Nashville Gas Co. v. Satty,* Title VII does not require the employer to pay the "incremental amount" necessary for a female to obtain as full a benefit as her male counterpart in the open market. Like the state in *Harris,* the State of Arizona did not place obstacles in the path of its female employees' exercise of their freedom of choice in purchasing life annuities, and need not remove those not of its own creation which are the result of the practices of the insurance carriers in using sex-based actuarial tables.

Nonetheless, the Court of Appeals in the instant case ruled — without citing any authority — that "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace or available options outside the employment context." 671 F.2d at 335. This statement misstates and glosses over the real issue. The issue is not whether an employer can institute or maintain a discriminatory policy as long as it "reflects the marketplace," but whether an employer's liability extends to conditions in the marketplace which it did not create. As the Court of Appeals states the issue, the employer has instituted or maintained its own discriminatory practice, but then attempts to excuse such practice because it "reflects the marketplace — that is *Manhart*. In contrast, in each of the above-referenced cases the employer did not institute the discriminatory practice and was therefore not held responsible for the acts of others over whom it had no effective control, even though it permitted its employees to be subjected to them. In each case, the employer was held not to have an affirmative obligation to eliminate discrimination caused by others and over which it had no control.

The reasoning of the above-referenced cases of this Court has been applied elsewhere by the lower courts in Title VII cases. *E.g., Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977); *Briggs v. City of Madison*, 536 F.Supp. 435 (W.D. Wis. 1982); *Barone v. Hackett*, 28 FEP Cases 1765 (D.R.I. 1982); *cf. Airline Pilots Association International v. Western Air Lines, Inc.*, 23 FEP Cases 1042, 1044-45 (N.D. Cal. 1979). In *Briggs v. City of Madison, supra*, a Title VII case, plaintiffs contended, *inter alia*, that it was no defense for the defendant city to point to market demands as its justification for upgrading the pay ranges of the public health sanitarians (who were all males) but not to raise the pay of the public health nurses. The district court rejected this contention and ruled:

> Under Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the

> marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants.

536 F.Supp. at 447.

Likewise, in *Barone v. Hackett*, 28 FEP Cases 1765 (D.R.I. 1982), plaintiff brought an action pursuant to Title VII and Section 1983 alleging that the benefits which she received under the Rhode Island Temporary Disability Insurance Act discriminated against her on the basis of sex because she received a smaller amount of benefits for disability owing to pregnancy than other disabilities. Despite the enactment of the Pregnancy Discrimination Act which amended Title VII to include discrimination on the basis of pregnancy, the district court concluded that the employer did not have an affirmative obligation to remedy discrimination suffered by its pregnant employees at the hands of a disability fund operated by others:

> While this language suggests that Congress intended to afford pregnant women the right to equal treatment in the employment setting, there is no indication that Congress intended to enforce this right by requiring employers like Hospital Trust to take affirmative steps to remedy discrimination suffered by its pregnant employees at the hands of others.

28 FEP Cases at 1769.

Petitioners submit that the Court of Appeals erred in holding them liable under Title VII for practices in the marketplace over which they had no control.[12] The instant case is in

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[12] The lower court cases which have held an employer responsible under Title VII for the practices of an insurance company which used sex-based actuarial tables all involved Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF), which were established by the Carnegie Foundation solely for the purpose of servicing educational institutions and with which the employer was held to be closely intertwined. Even then, there is a split in the circuits as to whether the employer should be held liable. In *Spirt v. Teachers Insurance and Annuity Association, supra*, No. 79-7715, -7737, -7739, the Second Circuit held that TIAA-CREF were "so closely intertwined" with the University that they must

[*Footnote continued on following page*]

stark contrast with *Manhart* where the employer itself required larger contributions from female employees, thus creating and controlling the very burden imposed upon its female employees. Here, similarly situated employees made equal contributions; the receipt of unequal monthly benefits, if they elected a life annuity, was a result of the use by independent insurance companies of sex-based actuarial tables, over which petitioners had no control.[13]

III

PETITIONERS CANNOT BE HELD LIABLE FOR DISCRIMINATORY TREATMENT UNDER TITLE VII WHERE THERE IS A FINDING THAT PETITIONERS DID NOT INTEND TO DISCRIMINATE.

It is now well settled that where an employee alleges less favorable treatment on the basis of race or sex under Title VII, proof of discriminatory motive "is critical." *Teamsters v. United States,* 431 U.S. 324, 333 n.15 (1977); *accord, Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 580 (1978); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-806 (1973).

[*Footnote continued from preceding page*]
be deemed an employer for purposes of Title VII, and held that the employer was liable for TIAA-CREF's practices since they exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees. In contrast, in *Peters v. Wayne State University, supra,* Nos. 79-1658, -1670, -1671, the Sixth Circuit held that TIAA was not the university's agent because the university exercised no control over it. In *EEOC v. Colby College, supra,* 589 F.2d 1139, the First Circuit simply vacated the district court's dismissal of the complaint and remanded the case, noting that it foresaw difficulties which did not arise in *Manhart* "in light of the Court's caveat that the statute was not intended to revolutionize the [insurance industry]." *Id.* at 1144. In the only other Title VII case of this type involving insurance companies, *Sobel v. Yeshiva University,* 477 F.Supp 1161, 1166 (S.D.N.Y. 1979), the district court simply concluded that the action could not be decided on summary judgment because of the difficulty in applying *Manhart* to a pension plan funded through a private insurance company.

[13] This Court has held that the power "to oppose" is not "tantamount" to a "right to control." *General Building Contractors Association, Inc. v. Pennsylvania, supra,* 73 L.Ed.2d at 851.

In *Teamsters v. United States,* this Court held that proof of discriminatory motive was critical where disparate treatment under Title VII was alleged:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. See, *e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 265-266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Teamsters v. United States, id., 431 U.S. 324, 335 n.15.

Likewise, in *Texas Dept. of Community Affairs v. Burdine, supra,* this Court held that in Title VII cases involving discriminatory treatment, "[t]he ultimate burden of persuading the trier of fact that the defendants *intentionally* discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253 (emphasis added).[14]

Respondent in the instant action alleges that she has been disparately treated on account of her sex. Accordingly, proof of discriminatory intent was "critical." However, in the instant case, the district court expressly found that the petitioners did

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[14] Proof of intent is not required where "the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 252 n.5; *Teamsters v. United States, supra,* 431 U.S. at 335-336 n.15. However, the instant case does not involve a facially neutral employment practice since the use of sex-based actuarial tables is clearly not facially neutral. Indeed, the decisions of this Court have analyzed the use of sex-based actuarial tables in terms of disparate treatment, not impact. See *Manhart, supra,* 435 U.S. at 708, 716 (where this Court refers to "treatment of individuals" and subsequently acknowledges that plaintiffs may not be able to establish a prima facie case under Title VII on the theory that "the effect of the practice on women as a class was discriminatory"); *Connecticut v. Teal,* ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed. 2d 130 (June 21, 1982) (where this Court stated that *Manhart* involved a facially discriminatory policy).

not have a discriminatory motive (and therefore held that petitioners had not violated the Equal Protection Clause of the Fourteenth Amendment):

> From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are [sic] the results of the insurers' judgment. This is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause of the Fourteenth Amendment. The Court finds that it does not.

Norris v. Arizona Governing Committee, 486 F.Supp. 645, 651 (D. Ariz. 1980).

Accordingly, since petitioners did not intend to discriminate, they cannot be held liable for discriminatory treatment under Title VII.

Nonetheless, the Court of Appeals in the instant case rejected the requirement of intent and erroneously concluded that the absence of discussion in *Manhart* on the issue of intent should be construed as a holding that intent need not be proven: "Manhart required no affirmative showing of intent. Nowhere was the need to prove intent discussed." 671 F.2d at 333.

However, in *Manhart*, intent to discriminate was obvious. The issue was never raised,[15] for there could be no dispute that the employer intended to treat women employees differently from men: it was the employer which decided that all women would have to make larger contributions from men and therefore the employer clearly intended to treat women differently. In contrast, in the instant case, Arizona was not responsible for the practice which treated women differently than men. Any disparate treatment was the result of the use of sex-based mortality tables by private insurance carriers. Accordingly, the

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[15] Where an issue is not raised, statements by the Court, or the lack thereof cannot be construed as rulings. *See Zipes v. Trans World Airlines*, ___U.S. ___, 102 S.Ct. ___, 71 L.Ed. 2d 234 (February 24, 1982) (holding that filing requirement under Title VII was not jurisdictional despite language in previous cases, where the requirement was not at issue in those cases).

lack of discussion in *Manhart* on the issue of intent was not because intent was not required, but because there could be no issue that an employer which *determined* that women would have to make greater contributions than men intended to treat them differently.

The Court of Appeals in the instant case alternatively held that no showing of intent was necessary because "facially discriminatory practices are intentional discrimination for purposes of Title VII regardless of the subjective motivation." 671 F.2d at 334.

However, whether "facially discriminatory practices" amount to intentional discrimination by an employer depends upon whether it is the employer who is responsible for the facially discriminatory practice. The two cases cited by the Ninth Circuit for its position, *Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973) and *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972) (which predate *Burdine* and *Teamsters*) involved facial discrimination by an employer which locked women as a class out of employment opportunities. In *Krause*, the employer refused to hire a woman as a bartender simply because she was a woman; *Schaeffer* involved a Title VII challenge to the rule of a taxi company which refused to permit female drivers to work more than eight-hour days, although male drivers were allowed to work nine-hour days. Clearly, in both cases, the employer intended to treat females differently from males, and the employer itself was responsible for the practice which treated them differently. Neither case stands for the proposition that a showing of intent is not necessary in order to hold an employer liable for discriminatory treatment.

Hence, unlike cases where the employer intends to treat employees differently on the basis of race or sex—whether for benign or malevolent reasons—in the instant case, petitioners did not intend to treat females differently. Arizona had no choice but to make available life annuities based on sex-distinct actuarial tables if it was to offer them at all since all available insurance companies used such tables. Petitioners' decision to

make lifetime annuities available was not made "because" they were based on sex-based tables but "in spite of" that fact, since the only annuities offered by the insurance carriers were sex-based.

In *Personnel Administrator of Mass. v. Feeney,* 422 U.S. 256 (1979), a case construing the Fourteenth Amendment,[18] this Court ruled that the concept of discrimination implied that the decisionmaker selected a particular course of action "because of" and not merely "in spite of" its adverse effects upon an identifiable group. In *Feeney,* the plaintiff challenged the constitutionality of a Massachusetts veterans' absolute preference statute on the ground that it discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment, since the statute benefited an "overwhelmingly" male class. However, in holding that the statute did not establish a classification that was overtly or covertly based upon gender, this Court ruled that the foreseeability of the statute's impact on women did not amount to discrimination under the Fourteenth Amendment. It concluded that discrimination requires that a particular course of action be selected "because of" and not merely "in spite of" its adverse effect:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. [Citation omitted.] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Personnel Administrator of Mass. v. Feeney, id., 442 U.S. at 279.

Similarly, in the instant case, petitioners' decision to make available to its employees lifetime annuities as one alternative

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[18] This Court has ruled that the concept of discrimination which has evolved from court decisions involving the Equal Protection Clause of the Fourteenth Amendment is a "useful starting point" for purposes of interpreting the term "discrimination" under Title VII. *General Electric Co. v. Gilbert, supra,* 429 U.S. 125, 133.

for recouping their tax deferred compensation was not made "because of" any alleged adverse effects on females but "in spite of" any such effects because the only actuarial tables in use by the insurance industry were sex-based. The district court in this action concluded that petitioners did not purposefully discriminate. Accordingly, the Court of Appeals erred in holding that petitioners violated Title VII since not only was there no proof of intent to discriminate, but the district court even made a contrary finding.

IV

THE RELIEF ORDERED BY THE COURTS BELOW IS AN ABUSE OF DISCRETION.

In the instant case, the district court permanently enjoined the petitioners from carrying out their obligations under A.R.S. § 38-871 et seq. "through the use of sex segregated actuarial tables, . . . and . . . direct[ed] that [future] annuity payments to female employees who have retired shall be equal to similarly situated male employees." *Norris v. Arizona Governing Committee, supra,* 486 F.Supp 645, 652. The Court of Appeals affirmed the relief.

However, the insurance companies which calculate and make the annuity payments on the basis of sex-based actuarial tables are not parties to this action, and indeed the Court of Appeals noted that the district court had not "required the companies to pay the adjusted annuities." 671 F.2d at 333. Hence, although the district court conceded that the development of the sex-based mortality tables was the result of the insurers' judgment, and not the petitioners, 486 F. Supp at 651, it is the petitioners, and not the insurance companies, which have been ordered to additionally compensate female employees.

Although Title VII provides that a court should order such affirmative action as may be appropriate, *Manhart, supra,* 435 U.S. at 718, it has been held inappropriate to require those who

did not instigate an unlawful employment practice and who acted only in a passive role to pay damages therefor. *E.g., Chastang v. Flynn and Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Guerra v. Manchester Terminal Corporation*, 498 F.2d 641 (5th Cir. 1974); *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579 (2nd Cir. 1976); *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 673 (M.D.N.C. 1974).

In *Chastang v. Flynn and Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976), the Fourth Circuit held that a corporate trustee of a discriminatory profit-sharing and retirement plan, which provided different benefits to male and female participants, should not be held liable for damages because of its passive role in the illegal discrimination. In *Chastang*, under the retirement plan sponsored by the defendant employer, a female's share of the fund would become non-forfeitable earlier than that of a similarly situated male. Although the Fourth Circuit held that Equitable Trust Company, which acted as corporate trustee for the plan, was properly joined in the suit so as to be bound to carry out any determination reached by the court, it held that it should not be liable for damages because of its passive role in the illegal discrimination:

> As corporate trustee for the plan, Equitable should be bound to carry out any conclusion reached by the court with respect to the plan's illegality. Thus, it was proper to join Equitable in this suit, and Equitable should have been retained as a party until a final decree was entered. Of course, because of Equitable's passive role in the illegal discrimination, it should not be held liable for the damages awarded to plaintiffs.

Chastang v. Flynn & Emrich Co., id., 541 F.2d at 1044.

In the instant case as well, petitioners are in a position not entirely dissimilar to the corporate trustee in *Chastang*. Petitioners were not responsible for the use of the sex-based actuarial tables by the private insurance companies and merely

played a passive role by contracting with insurance companies in order to give their employees the option of recouping their deferred compensation in the form of life annuities.

Again, in *Hairston v. McLean Trucking Company, supra,* 62 F.R.D. 642, the district court held that since the local union took no affirmative action in the discrimination — although it knew of the company's actions and encouraged such discrimination by its own inaction — it did not have to pay any part of the back-pay award, and only one-third of the costs and attorneys' fees awarded. *Id.* at 673.

In a non-Title VII suit, *Ortega v. Usery,* 441 F.Supp 100 (D. Conn. 1977), the district court denied, *inter alia,* the plaintiff's application for a preliminary injunction requiring the State of Connecticut to guarantee unemployment compensation payments, where the State of Connecticut merely acted as a "conduit" through which payment was made to claimants. There, plaintiffs challenged the allegedly excessive delays by the State of Connecticut in the processing of interstate unemployment compensation claims. Because the State of Connecticut did not determine the eligibility of the claimants nor pay the benefits, but merely acted as a conduit for their claims to other states where the claimants were formerly employed, the district court held that it was "totally unwarranted" to require the state to guarantee payments:

> With respect to an interstate claimant, the potential for delay is even more acute. Interstate claims are forwarded by Connecticut to the state where the claimant was formerly employed. Connecticut does not determine eligibility nor is it responsible for payment; it is merely a conduit through which payment is made to the claimant. Under these circumstances, injunctive relief requiring the State of Connecticut to guarantee payments to interstate claimants within a 14-day period would be totally unwarranted.

Ortega v. Usery, id., 441 F. Supp at 104.

In the instant case as well, the State of Arizona simply acts as a conduit between the employee and the particular insurance company which is actually responsible for the payment of annuities. The petitioner Governing Committee merely contracts with insurance companies, bank trustees or custodians, and investment counseling firms to provide as great a variety for the return of deferred compensation to its employees as it can.

It is significant that in the only case other than the instant one involving an insurance company, where the court has ordered that monthly annuity benefits for females be equalized to those of males, the insurers (TIAA-CREF), which were also parties to the suit, were the ones required to change to gender-neutral mortality tables and to calculate and pay benefits so that female and male benefits would be equal. The employer was simply enjoined from making contributions to any pension fund using sex-based mortality tables. *Spirt v. Teachers Insurance and Annuity Association, supra,* nos. 79-7715, -7737, -7739. Only in the instant case has an employer in a completely passive role been ordered to additionally compensate the female employees receiving a lower monthly annuity benefit from an insurer.

In addition, the relief ordered here constitutes an abuse of discretion because it overturns the nondiscriminatory judgment of the state legislature that the plan was to operate "without cost or contribution from the state . . . ." A.R.S. § 38-871 C.1. There was no finding in this case—nor could there be—that the decision of the Arizona legislature to establish a voluntary deferred compensation plan "without cost" to the state was discriminatory or unfair in any way. The legislature merely intended to grant Arizona's employees the opportunity to obtain tax-deferred benefits by deferring a portion of their income. Nonetheless, the relief ordered by the courts below goes beyond remedying those acts of Arizona which were found discriminatory (and which only constituted the act of con-

tracting with insurers, not the development of sex-based actuarial tables) and also overturns the admittedly nondiscriminatory judgment of the legislature that the plan was to be without cost to the state.

An abuse of discretion in Title VII cases may be found where the ordered relief will fall in large part on "innocent third parties." *Manhart*, 435 U.S. 702, 723; *Ford Motor Company v. EEOC*, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 721, 737 (June 28, 1982). In *Manhart*, this Court based its conclusion that it was error to grant retroactive relief in part because "[t]he harm would fall in large part on innocent third parties." 435 U.S. at 723.[17] Likewise, in *Ford Motor Company v. EEOC*, *supra*, this Court rejected the lower court's suggestion that the employer must promise to a discharged employee retroactive seniority along with a job offer in order to cut off its back pay liability, since such a rule would place "a particularly onerous burden on the innocent employees of an employer charged with discrimination": The employer would be able to cut his back-pay liability only by forcing his incumbent employees to yield seniority to a person who had not proven unlawful discrimination. *Id.* at 737.

In the instant case, the lower courts' order for relief also impacts upon innocent third parties—the Arizona taxpayers—whose legislature merely intended to set up a deferred compensation plan for state employees, without cost to the taxpayer. A.R.S. § 38-871 C.1. Despite that nondiscriminatory legislative judgment, and despite the fact that petitioners merely set aside the deferred salary of employees, the lower courts would have the State of Arizona provide additional contributions for those female employees choosing life annuities (thereby providing female employees with a larger retirement

[17] The relief granted in this case is, in effect, retroactive in nature. While not requiring reimbursement for benefit payments already made by the insurance carriers, it nonetheless requires the State of Arizona to fund payments that were not contemplated by respondent, the insurance carriers, or petitioners. It requires additional payments for annuities which have already been funded, and for which no additional reserves had been saved by anyone. This was the very reason this Court denied retroactive relief in *Manhart*.

fund) so that the benefits provided by the insurance companies which use the sex-based actuarial tables could be equalized to those provided males over their shorter lifetimes. These additional contributions would ultimately come from the taxpayers whose legislators had simply intended to provide a means for an employee to defer taxes on a portion of his or her income until a later date, without cost to the state.

CONCLUSION

For all the foregoing reasons, petitioners request that this Court reverse the judgment of the Court of Appeals, and order that judgment be entered in their favor.

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In The

Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether an employer who creates and substantially controls a retirement benefit that pays less to women than men is absolved of liability under Title VII of the Civil Rights Act of 1964, as amended, because less attractive alternatives are offered, or because the employer contracts out for the benefit.

2. Whether the district court, in exercising its broad remedial powers under Title VII, properly awarded prospective relief.

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STATEMENT OF THE CASE

A. *Nature of the Arizona Deferred Compensation Plan.*

Since 1974,[1] the State of Arizona (employer) has offered a deferred compensation plan (plan) to its 35,000 employees. J.A.[2] at 6-7. The plan allows employees to apply to the state employer to defer until retirement the payment of a portion of compensation earned while working. The employer has discretion to approve or reject such applications. Exh. 2, p. 1; Exh. 10, p. 5; Exh. 11, p. 5. If the employer approves an employee's application, the employee may request payment of the deferred compensation upon retirement in one of three ways: (1) a lump sum; (2) a periodic payment for a specified length of time; or (3) a monthly annuity for the remainder of the employee's life. J.A. at 7-9.

The employer created the plan as an inexpensive way to help attract and retain employees. Exh. 10, p. 10; Exh. 11, p. 10. The employer absorbs some of the costs of administering the plan, but does not itself contribute any monies to the plan to supplement the deferred compensation earned by its employees. Ariz. Rev. Stat. Ann. § 38-871.C.1. (West Supp. 1975-1982); J.A. at 6-7. Nonetheless, the plan is attractive for two reasons. First, because deferred compensation is included in the employee's gross income when paid out and not when earned, current taxable income is reduced. J.A. at 7; Exh. 10,

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[1]The legislation establishing Arizona's deferred compensation plan was enacted in 1972. Ariz. Rev. Stat. Ann. §§ 38-871 to -874 (West 1974 & Supp. 1975-1982). The plan was implemented in 1974, when the state received a favorable letter of determination from the Internal Revenue Service. J.A. at 7.

[2]The Joint Stipulated Statement of Facts is reproduced in its entirety in the Joint Appendix (J.A.). The exhibits (Exh.) to the Joint Stipulated Statement of Facts have not been reproduced, but are contained in the Record (R.) at R. 15.

pp. 3-5, 8; Exh. 11, pp. 1, 3-5, 8. Second, when the deferred compensation is paid out, the employee is retired and generally in a lower tax bracket. *Id.* The lump sum payout option imposes immediate tax consequences upon receipt and therefore largely defeats the tax benefits of the plan.

As of August 18, 1978, there were 1,675 employees in the plan, 681 of whom were women. J.A. at 6. Of the 681 women 572, or 84%, had requested the lifetime annuity option. *Id.* Of all the options, the lifetime annuity option is the only one that allows an employee to fully insure benefits throughout retirement.

However, under the plan's lifetime annuity, women are paid less per month than similarly situated men. J.A. at 10. The result is that all women under the lifetime annuity receive less to live on each month while they are retired, and no more to live on each month while they are working, than similarly situated men who defer precisely the same amount of income. Unlike the employer's mandatory retirement program where employee contributions and benefits are sex-neutral, Ariz. Rev. Stat. Ann. §§ 38-781.01 to -781.37 (West 1974 & Supp. 1975-1982), the employer has never required that lifetime annuity payments under its deferred compensation plan be sex-neutral. Rather, pursuant to public procurement statutes, Ariz. Rev. Stat. Ann. §§ 41-729, -730, 41-1051 to -1056 (West 1974 & Supp. 1975-1982), the employer contracts with private companies for the use of sex-based actuarial tables to determine how retired employees will be paid income deferred under the lifetime annuity option of the plan. J.A. at 7-10, 12.

Indeed, the employer has not merely contracted with companies for the payment of lifetime annuity benefits solely on the basis of sex, but actually solicited a separate schedule of

monthly annuity benefits for males and females. In 1977, for example, the employer issued contract procurement documents that asked:

> H. 2. What is the monthly annuity per $1,000 applied for each of these combinations: What is the interest rate underlying these annuity rates?
>
> a. Male age 65 10 years Certain & Life
> b. Female age 65 10 years Certain & Life
> c. Male age 65 Straight Life
> d. Female age 65 Straight Life

Exhibit H to First Set of Interrogatories to Defendants with Answers, R. 12a.[3]

Some companies with whom the employer contracts use crude "setbacks" under which male mortality tables are setback anywhere from four to six years to approximate greater female life expectancy. J.A. at 12 (6 years); Exh. 3, p. 6 (4 years); Exh. 4 (5 years); Exh. 5, p. 5 (4 years); Exh. 6R, p. 10 (4 years); Exh. 7, p. 8 (5 years). Other companies under contract with the employer use segregated male and female mortality tables. J.A. at 12. The actuarial tables are based exclusively on the sex of the employee; none incorporate bona fide mortality variables such as smoking habits, alcohol consumption, weight, prior medical history, and family history. J.A. at 12-13.

In their statement of the case, the employer and amici significantly misrepresent to this Court the stipulated facts with respect to sex-segregated tables. Citing to the Joint Stipulated Statement of Facts, the employer states that "all of the insurance companies which were available to Arizona to provide life annuities used such sex-based mortality tables." Brief of Petitioners (Pet. Br.) at 3. Nothing, however, in either the Joint Stipulated Statement of Facts or in any other portion of the record supports that statement by the

[3] R.12a is part of the district court record.

employer.

The Joint Stipulation quite clearly states that "all of the companies *participating in the State Deferred Compensation Plan* use sex segregated actuarial tables." J.A. at 12 (emphasis added). Similarly, another portion of the stipulation—under "Description of the Plan"—provides: "The amounts received are determined by the use of actuarial tables published by the particular company. All tables presently in use provide a larger sum to a male than to a female of equal age . . . ." J.A. at 6, 10. The latter sentence, placed in context with the preceding sentence and under the title "Description of the Plan," clearly refers to tables *in use in the Arizona deferred compensation plan*, not all tables in use in the industry.[4] The stipulated description of the Arizona plan hardly supports the broad and frequently repeated assertions of the employer and amici that all companies "available" to Arizona use sex-based mortality tables.[5]

Once the employer contracts with each private company, the employer maintains close control over the operation of the plan through various contract provisions. For example, under the terms of the contracts, the employer, and not the employee, has the sole power to exercise all the rights, options, and privileges granted or permitted under the contracts.

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[4]The employer's misrepresentation of the facts about the availability of sex-neutral annuity plans is the erroneous theme and factual predicate for its entire brief; misrepresentations of these facts can be found in Pet. Br. at i, 3, 5, 8, 9, 11, 14, 15, 17, 26 & 28.

[5]The absence of any such stipulation is further evidenced by the employer's motion for summary judgment in the district court. There, it argued that respondents were obligated to prove the existence of unisex tables, R. 22, p. 6; obviously, if the parties had stipulated to the fact that no unisex plans were available, this argument would not have been necessary.

Exh. 3, pp. 1-5, 13; Exh. 5, p. 2; Exh. 6R, p. 5; Exh. 7, p. 6. Only the employer or the investment company, and not a participating employee in the plan, may amend or modify the investment contracts. Exh. 3, p. 3; Exh. 5, p. 8; Exh. 6R, p. 5. The employer, and not the employee, is the "contract owner," Exh. 3, p. 1; Exh. 5, pp. 1, 2; Exh. 6R, p. 1; Exh. 7, p. 6; or the "contractholder," Exh. 4, p. 1, of the deferred compensation instrument; the employee is the passive beneficiary of whatever actions the employer or company take. *Id.*

The employer's control over the plan is so extensive and complete that all deferred employee funds remain assets of the employer until payment, subject to the claims of the employer's general creditors. Exh. 10, p. 16; Exh. 11, p. 15. The employer retains complete legal title to all of the funds its employees choose to defer under the plan; employees have only a future, contingent legal claim for payment against the employer for their deferred compensation. Exh. 10 at pp. 4, 7, 16; Exh. 11 at pp. 4, 7, 15.

As a result, employees participating in the plan may only ask the employer to invest their deferred compensation in a particular investment option of a particular company; under the plan, the employer has an absolute right to approve or reject the employee's choice of an investment company and a payout option. Exh. 2, p. 2; Exh. 10, pp. 6, 8, 13; Exh. 11, pp. 5, 7, 12. And, if an employee faces a serious financial hardship and needs some or all of the money deferred under the plan, he or she may apply to the employer to withdraw monies, but the employer, in its sole discretion, decides whether to approve or deny such requests. Exh. 10, pp. 7, 14; Exh. 11, pp. 6, 13. Even if an employee decides to stop contributing to the plan, the monies already deferred generally

remain in the plan, subject to all of the foregoing restrictions, until the employee retires. Exh. 10, p. 6; Exh. 11, p. 6. Finally, if a participating employee dies before retirement, or if employment terminates by reason of resignation or dismissal, the employer, in its sole discretion, determines the manner of payment. Exh. 10, pp. 7-8, 13-14; Exh. 11, pp. 7, 13.

In addition to the contracts between the employer and the companies, the plan is closely monitored by the employer. The administrative regulations delineate the authority of the employer, through petitioner Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, to solicit and select the companies that may participate in the plan, Exh. 1, p. 9, and police the marketing approaches and selling practices used by the investment companies selected. *Id.* In fact, the regulations expressly prohibit all contact between the investment companies contracting with the employer and employees who participate in the plan unless the employer has first been presented with the company's solicitation documents and approved them in advance of their use. *Id.* at p. 11. Finally, only the employer has the right to disqualify contracting investment companies for violations of administrative rules. *Id.* The employer's role in this plan is active and dispositive.

B. *Respondents' Claim and the Proceedings Below.*

On May 3, 1975, respondent Nathalie Norris applied to participate in the plan. J.A. at 11; Exh. 2, p. 1. On May 9, 1975, the employer approved Ms. Norris' request and began deferring $199.50 from her salary each month. *Id.* Ms. Norris has requested a lifetime annuity under the plan with payments guaranteed for ten years after her retirement. J.A. at 11-12; Exh. 2. Assuming all things remain the same (amount

of salary deferred, return on salary deferred, choice of investment company and option), Ms. Norris will receive $320.11 per month for life, with ten years of payments certain, when she retires. J.A. at 12. Under precisely the same circumstances, a male employee would receive $354.06 per month with ten years certain, or $33.95 more each month than Ms. Norris. *Id.* This 10.6% differential computes to $407.40 over a one-year period, $4,074 over ten years, and $8,148 over twenty years.

Ms. Norris challenged the plan, alleging that the unequal payment of deferred compensation to similarly situated male and female employees violates section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976). Based upon the facts set forth above, the district court granted summary judgment in favor of Ms. Norris on her Title VII claim.[6] The district court rejected the employer's attempt to distinguish *Norris* from this Court's decision in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). Accordingly, the district court ordered the employer to equalize annuity payments to similarly situated male and female retired employees who participate in the Arizona plan. *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 652 (D. Ariz. 1980).

The Court of Appeals for the Ninth Circuit affirmed on the basis of this Court's decision in *Manhart*. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 336 (9th Cir. 1982).

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[6]Respondents also alleged an equal protection claim under the fourteenth amendment that the court denied and respondents did not appeal.

SUMMARY OF ARGUMENT

In *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), this Court held that retirement or pension plans which classify women on the basis of sex rather than individual characteristics are illegal under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976 & Supp. IV 1980).

Manhart involved an employer-operated pension plan which required unequal contributions from men and women; this case involves a deferred compensation plan offered by an employer with unequal payments to men and women. Both plans discriminate against women as a class; both plans treat women differently than men solely on the basis of their sex. The decisions of the Ninth Circuit Court of Appeals and the district court invalidating the discriminatory portion of the Arizona deferred compensation plan are fully faithful to *Manhart*.

The employer in this case exercises nearly total control over the plan; it solicits bids, contracts with a few private companies to invest and pay out deferred compensation to employees upon retirement, determines whether to accept or reject an employee's request for a particular type of investment and payout, and retains title to the funds until they are disbursed. Private companies with whom the employer contracts use sex-segregated actuarial tables to calculate lifetime annuity payments.

Contrary to the assertion of the employer, the record contains no evidence that all of the insurance companies in the United States use sex-based actuarial tables. Nor is there any evidence that this large employer, with 35,000 employees, could not have negotiated a contract with a company to use sex-neutral tables.

Nothing in this Court's opinion in *Manhart* suggests, as the employer argues, that there is an "open market exception" which takes this case outside the boundaries of Title VII. While this Court has acknowledged that an employer can give a lump sum to each individual employee upon retirement and allow him or her to go out into the free market and purchase whatever benefits he or she can obtain, that is very different from this case where the *employer* goes to the marketplace, expressly solicits sex-based bids, and then offers its employees a choice among only a few companies, all of which use sex-segregated actuarial tables.

As the employer itself admits, the lifetime annuity option under the plan classifies employees on the basis of sex. All women are deliberately treated differently than men. No further showing of employer intent is required. The employer here voluntarily provided an additional fringe benefit in the form of a deferred compensation plan, voluntarily decided to contract out the operation of that plan, and voluntarily contracted with companies it knew used sex-based tables. As a result, the employer created a discriminatory program affecting the "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1) (1976), and there is nothing unfair about holding the employer responsible for the choices made.

Title VII prohibits an employer from offering a discriminatory fringe benefit regardless of whether the employer also offers nondiscriminatory alternatives. Options and choices permeate the employer-employee relationship, but these choices do not affect the applicability of Title VII.

Finally, the district court's order of prospective relief is well within the broad remedial powers of Title VII to "make

persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

ARGUMENT

I.

UNDER *MANHART*, THE ARIZONA DEFERRED COMPENSATION PLAN CONSTITUTES A VIOLATION OF TITLE VII.

A. Manhart *Requires an Employer to Treat Women Employees as Individuals, Not as a Class.*

This is the first case to reach this Court concerning sex-based differentiation in employment-connected retirement plans since *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). *Manhart* involved an employer-operated retirement plan in which working women were required to make considerably higher monthly contributions than men. The employer's justification was that women, considered as a class, live longer on the average than men as a class, so that more periodic retirement payments would have to be made to women in the aggregate than men in the aggregate. This Court made clear in *Manhart* that such a justification is entirely antithetical to the premises of Title VII of the Civil Rights Act of 1964:

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. *It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.* . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the gener-

alization does not apply.

> That proposition is of critical importance in this case because *there is no assurance that any individual woman working* for the Department *will actually fit the generalization* on which the Department's policy is based. . . .

Manhart, 435 U.S. at 708 (emphasis added).[7]

Manhart also rejected the corollary proposition that Congress may have intended a special definition of discrimination in the context of employee group insurance coverage. 435 U.S. at 710. "*Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII.*" *Id.* (emphasis added).

The Court dismissed the idea that this application of Title VII was somehow unfair or even sanctioned unlawful discrimination. First, insurance schemes generally, and group insurance programs particularly, rely for their very success upon subsidization of poorer risks by better risks; as the Court recognized, there is nothing fundamentally unfair about requiring short-lived men to "subsidize" long-lived people of both sexes, rather than only long-lived men. 435 U.S. at 710. Second, the statutory scheme itself permits differences in compensation "based on [a] factor other than sex," 29 U.S.C. § 206(d) (1976), as incorporated in 42 U.S.C. § 2000e-2(h) (1976); because under a gender-neutral plan individual benefits are not determined on a hypothetical life span projected on the basis of, for example, race, sex, or other classifications forbidden under Title VII, no man

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[7] The statutory focus on the individual and the vitality of the rationale in *Manhart* were reaffirmed last term in *Connecticut v. Teal*, 102 S. Ct. 2525 (1982), where this Court rejected a "bottom line" defense to Title VII. *See infra* at 31-32.

could complain of unlawful discrimination. *Manhart*, 435 U.S. at 710-11 n.20.

In *Manhart* the sex-based averaging resulted in less take-home pay for each woman to meet expenses while working, with no guarantee that any individual woman would live to collect retirement benefits aggregating that collected by either a comparable man or the "average" man. Here, the sex-based approach to the life annuity program results in lower periodic retirement benefits for women to meet expenses once retired, with no guarantee that any individual woman will live to collect benefits aggregating that collected by either a comparable male or the "average" male. Under *Manhart*, Title VII precludes, "in the context of employee group insurance coverage" as well as in other contexts, 435 U.S. at 710, "treatment of individuals as simply components of a . . . sexual . . . class." *Id.* at 708. Predicting "[i]ndividual risks . . . by resort to classifications proscribed by Title VII," *id.* at 710, is no more valid when the prediction is used to discount women's benefits *after* they retire than when used to decrease their take-home pay when working.

B. *As the Ninth Circuit Correctly Held, Title VII Prohibits the Payment of Unequal Benefits on the Basis of Sex.*

The operative language of section 703(a) of Title VII is, as the Court emphasized in *Manhart*, 435 U.S. at 708, unambiguous in its focus on the individual:

> It shall be an unlawful employment practice for an employer-
>
> (1) . . . to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* . . . sex . . . .

42 U.S.C. § 2000e-2(a) (1976) (emphasis added).

The statutory protections embrace benefits such as those involved here *Manhart*, 435 U.S. at 712 n.23 (pension benefits); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (health and disability benefits); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (state retirement benefits); *see also* Guidelines of Equal Employment Opportunity Commission, 29 C.F.R. § 1604.9 (1982).

The retirement program before this Court in this case differs from that involved in *Manhart* in only three respects, none of which are legally significant in terms of the application of Title VII. First, the sex-based differentiation is not in the employees' contributions into the plan, but instead, in the periodic life annuity benefits paid to employees upon retirement. Second, the plan is not solely employer-operated; rather, the employer contracts with private insurance companies and financial institutions while maintaining considerable direction and control over the operation of the plan. Finally, the plan offers employees some highly unsatisfactory alternatives to the preferred annuity benefit.

As petitioners in this case implicitly recognize by their choice of legal issues presented to this Court,[8] the first

[8] The two questions presented are quite narrowly drawn. Petition for Writ of Certiorari at i, Pet. Br. at i. The second question addresses only the appropriateness of the remedy if a violation of Title VII is found, while the first concerns whether either the availability of a nondiscriminatory option or the insured nature of the plan absolves the employer of responsibility for the sex-based differentiation

difference between this case and *Manhart* is one which is of no decisional consequence: As in *Manhart*, many individual women will in fact be harmed by the sex-based differentiation in annuity benefits because their life spans will more closely resemble that of the average male than that of the average female.[9] As will be shown more fully below, *infra* at 25-33, the other differences—the extent of employer involvement and the presence of nondiscriminatory options—in no way detract from the controlling effect *Manhart* has on this case.

In many ways, the sex-based differential in retirement benefits in this case is even more egregious than the differential in wages in *Manhart*. Nathalie Norris, like other retired women, will most likely receive this lesser benefit when she must live on a fixed income. The $33.95, or 10.6%, difference between her monthly payments and those of a similarly situated man amounts to $4,074 over 10 years and $8,148 over a 20-year period. In her older years, this lesser amount available to

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in life annuity periodic benefits. The assumption underlying the first question appears to be that this scheme *would* violate Title VII under the *Manhart* analysis if it were both totally employer-operated and without nondiscriminatory options.

Many of the amici appearing on petitioners' behalf fail to recognize the limited nature of the issues before the Court for review. "Only the questions set forth in the petition [for writ of certiorari] or fairly included therein will be considered by the Court." Rules of the Supreme Court of the United States, Rule 21.1.(a). For this reason, and because many of the issues raised by the amici were fully briefed in *Manhart*, respondents do not address in this brief many of the arguments that are disputed by the various amici but are beyond the scope of the issues before the Court in this case.

[9] As the Ninth Circuit observed in its decision, 84% of women have the same life span as 84% of men. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 332 n.1 (9th Cir. 1982). *See also* Bergmann & Gray, *Equality in Retirement Benefits: The Need for Pension Reform*, 8 Civ. Rts. Dig. 25 (1975).

Ms. Norris, like all retired women, is likely to affect her ability to meet even her basic needs.

Since *Manhart*, numerous courts have concluded that retirement plans that require male and female employees to make equal contributions but pay smaller annuities to women than men are illegal under Title VII. *Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978); *Hannahs v. New York State Teachers' Retirement System*, 26 Empl. Prac. Dec. (CCH) ¶ 32,037, 26 Fair Empl. Prac. Cas. (BNA) 527 (S.D.N.Y. 1981). These courts have also held that retirement and pension programs which differentiate women as a class from men as a class violate Title VII under *Manhart*. *See also Retired Public Employees' Association v. California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 14, 1982) (No. 82-262); *Probe v. State Teachers' Retirement System*, 28 Empl. Prac. Dec. (CCH) ¶ 32,601, 27 Fair Empl. Prac. Cas. (BNA) 1306 (C.D. Cal. 1981), *appeal docketed*, Nos. 81-5865, -5866 (9th Cir. October 19, 1981); *Women in City Government United v. City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *Shaw v. International Association of Machinists & Aerospace Workers*, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980).

Only one circuit court has held to the contrary. *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). Respondents submit that *Peters* was poorly reasoned and fundamentally unfaithful to *Manhart*.

Peters held:

> The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not [unlawful under Title VII].

Peters, 691 F.2d at 241. But as this Court held in *Manhart*, it is not true that "an actuarial distinction based entirely on sex is 'based on any other factor other than sex.' Sex is exactly what it is based on." 435 U.S. at 712-13 (quoting *Manhart v. City of Los Angeles, Department of Water & Power*, 553 F.2d 581, 588 (9th Cir. 1976)). The use of sex-segregated tables is no less offensive to the proscriptions of Title VII when used in computing payments as in *Norris* and *Peters* than in computing contributions as in *Manhart*. In each instance, the computations impermissibly treat "individuals as simply components of a . . . class." *Manhart*, 435 U.S. at 708.

Peters erroneously concluded that sex-segregated tables do not violate Title VII if the value of the annuities is actuarially equivalent for men and women. 691 F.2d at 238. *See also* Brief of National Association of Insurance Commissioners as Amicus Curiae in Support of Petitioners at 22-26; Brief of Equal Employment Advisory Council as Amicus Curiae in Support of Petitioners at 15-22. The argument that the benefit received by men and women is of equal value when computed on the basis of actuarial tables is nothing more than a reargument of *Manhart*: "The Department . . . contend[s] that . . . the differential in take-home pay . . . was not discrimination . . . because it was offset by a *difference in the value of the pension benefits* provided to the two classes of employees . . . ." *Manhart*, 435 U.S. at 706 (emphasis added).

As commentators have observed:

> This expectancy argument begs the question in a fundamental way. The ultimate issue is precisely whether mortality data may be classified by sex for the purpose of paying annuities—that is, whether sex may be used to predict longevity. No expectancy can be calculated until that question has been answered. The statement that some particular person is expected to live some certain number of years is dependent on a prior decision about how to classify that person. It is circular to use the expectancies generated by a predictor to justify using that predictor.

Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. L. Rev. 505, 512 (1980) (footnote omitted).[10] To look at the total value to women as compared to men presumes the classification by sex to be permissible and further presumes that the benefit to be examined is the total benefit that will inure to the class, not the monthly benefit that is actually received by an individual woman. Both presumptions—the classification by sex and the application "of group averages to individuals," *id.* at 513—were unequivocally proscribed by *Manhart*. *See Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054, 1060-62 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

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[10] In this important analysis, the authors conclude that both the validity of the sex-based mortality tables as predictors of longevity and their universal application are highly questionable. Brilmayer *supra* at 539-59. *See Manhart*, 435 U.S. at 709-10 & nn.17-18.

C. *Petitioners Misconstrue the Requirement of "Intent."*[11]

In an attempt to absolve itself of legal responsibility for the explicit sex-based differentiation among employees which is the subject of this lawsuit, the employer maintains that it did not "intend" to discriminate and therefore cannot be held to have violated Title VII.[12] This argument is premised upon a fundamental misunderstanding concerning the content of the motive requirement in a Title VII disparate treatment case.

As the employer recognizes, Pet. Br. at 24, unlawful employment discrimination under Title VII of the Civil Rights Act of 1964 may be established in one of two ways. The two available theories were summarized by this Court in *International Brotherhood of Teamsters v. United States*, 431

[11] Petitioners argue that the issue of intent was not raised in *Manhart* and "[w]here an issue is not raised, statements by the Court, or the lack thereof cannot be construed as rulings." Pet. Br. at 25 n.15 (citation omitted). To the contrary, the issue of intent was argued by the petitioners in *Manhart*. Opening Brief of Petitioners in *City of Los Angeles, Department of Water & Power v. Manhart* at 38.

[12] Several amici make a superficially similar but much more sweeping argument. They suggest that *any* retirement plan which provides "actuarially equivalent" benefits is one as to which there is no "intent" to discriminate within the meaning of Title VII, even if the employer runs the entire program itself. Brief of Teachers Insurance and Annuity Association and College Retirement Equities Fund as Amici Curiae in Support of Petitioners at 12-20; Brief of New York State Teachers' Retirement System as Amicus Curiae in Support of Petitioners at 11-13; Brief of Equal Employment Advisory Council as Amicus Curiae in Support of Petitioners at 15-16; *see Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). Like the other arguments concerning whether *Manhart* precludes gender-differentiated retirement benefits, these contentions do not address any question properly before the Court for decision. *See supra* n.8. We note, however, that amici's "intent" arguments fail for basically the same reasons that petitioners' argument fails. *See infra* text.

U.S. 324 (1977):

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

431 U.S. at 335-36 n.15 (citations omitted).

The employer extracts from this passage the phrase "proof of discriminatory motive is critical," and suggests that a Title VII disparate treatment case requires some manner of proof of subjective state of mind beyond that established in the record in this case.[13] This Court has never suggested, however, that

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[13]Petitioners rely on a sentence in the district court opinion in *Norris* concerning the employer's lack of invidious discriminatory purpose, which petitioners mistakenly elevate to the stature of a relevant finding of fact. Pet. Br. at 25. First, the district court's determination was made in the context of its understanding of the equal protection clause of the fourteenth amendment, and not with regard to Title VII legal standards. *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 651 (D. Ariz. 1980). Second, while petitioners now recognize that "the instant case does not involve a facially neutral employment practice since the use of sex-based actuarial tables is clearly not facially neutral," Pet. Br. at 24 n.14, the district court was of the view that "[s]ince the Arizona statute is gender-neutral on its face, the Court must then consider whether the classification . . . results nevertheless

the discriminatory motive, intent, or purpose required in a Title VII disparate treatment case is anything other than knowingly treating all women differently from all men on the basis of gender.[14]

The line of cases deriving from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), on the question of the mode of proof of the requisite discriminatory motive and purpose, indicates that the only "state of mind" issue in Title VII disparate treatment cases is whether the employer consciously drew an explicit, invariable line on the basis of sex, race, or other criteria that Title VII proscribes. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

In all of these cases, the employer purported to be making employment decisions upon the basis of criteria *other than*

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in an adverse effect . . . ." 486 F. Supp. at 651. The district court therefore erroneously evaluated the case as one of disparate impact, not disparate treatment. Because the case was decided upon stipulated facts that are silent as to the state of mind of the employer, and because there was no testimony on any issue, the court's statement that the classification was "somewhat less than the purposeful invidious gender-based discrimination necessary for a finding" of a violation of the fourteenth amendment can only be a conclusion of law and not one of fact. *Id.*

[14]This interpretation is obviously what the Court had in mind by its recognition in *Teamsters* that "discriminatory motive . . . can in some situations be inferred from the mere fact of differences in treatment," *Teamsters*, 431 U.S. at 335, and of its citation to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). In *Arlington Heights*, at the pages cited, the discussion concerns when use of racial criteria can be inferred simply from "a clear pattern, unexplainable on grounds other than race . . . even when the governing legislation appears neutral on its face." *Id.* at 266. This interpretation is also consistent with the meaning of intent in the customary legal sense. *See, e.g.*, W. Prosser, Law of Torts 31 (4th ed. 1971).

the race or sex of the employee. The question before the Court in those cases was how it could be proven, nonetheless, "that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' " *Furnco*, 438 U.S. at 576 (quoting *Teamsters*, 431 U.S. at 358). Thus, "the allocation of burdens [of proof] . . . [was] intended progressively to sharpen the inquiry into [this] elusive factual question of intentional discrimination," while leaving the ultimate burden of proof on the plaintiff. *Burdine*, 450 U.S. at 255 n.8. But the "intentional discrimination" which ultimately must be proven is simply "the consideration of impermissible factors" in making employment decisions. *Id.* at 254 (quoting *Furnco*, 438 U.S. at 577). This Court has never imposed a requirement that an employee or applicant show *why* the employer engaged in a practice of using racial or sexual criteria, or whether the idea to do so originated in the employer's mind or in the mind of someone else.

Here, no "facially neutral employment practice [is involved] since the use of sex-based actuarial tables is clearly not facially neutral." Pet. Br. at 24 n.14. Because the employer concedes that the plan classifies on the basis of sex, there is simply no "intent" issue as in the *McDonnell Douglas* line of cases. Rather, as in *Manhart*, the practice here at issue indisputably fails "the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' " *Manhart*, 435 U.S. at 711 (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971)). Because the employer here knowingly and consciously classified women on the basis of their sex, no further inquiry into intent is required

under this Court's precedents.[15]

Even under the *McDonnell Douglas* line of cases, the employer has the burden of articulating "some legitimate, nondiscriminatory reason" for its action. *Furnco*, 438 U.S. at 578 (quoting *McDonnell Douglas*, 411 U.S. at 802). The record in this case contains no evidence of any lawful reason for using sex-segregated tables, nor could any legitimate reason be articulated under this Court's decision in *Manhart* and this plan.

The employer argues, nonetheless, that "whether 'facially discriminatory practices' amount to intentional discrimination by an employer depends upon whether it is the employer who is responsible for the facially discriminatory practice." Pet. Br. at 26. This circular reasoning does little to further the analysis. Moreover, there is no case law under Title VII that even remotely suggests that liability for the practices of an employer is contingent upon where the idea originated.

In a world in which employers increasingly turn to consulting specialists and other contractors in administering labor relations, the effect of the employer's suggestion on

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[15]The employer has unpersuasively relied upon *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), as somehow relevant on the issue of intent. Pet. Br. at 27. That case, however, dealt with a facially-neutral rule—an absolute preference for veterans. The exclusion of women in that case, unlike this case, was not on the basis of sex, but because they were nonveterans. 442 U.S. at 275. In *Feeney*, unlike this case, some women fell into the favored class and many men who were not veterans were excluded. The primary question before the Court in *Feeney* was whether, under the fourteenth amendment, the employer had an unconstitutional "gender-based discriminatory purpose." *Id.* at 276. Thus, *Feeney* is distinguishable on three important grounds: It involved (1) a facially-neutral policy (2) not drawn along gender lines (3) challenged under the fourteenth amendment, not Title VII.

Title VII could be profound. Employers could contract out for various services relating to terms and conditions of employment and then claim they did not "intend" the discriminatory programs which they knowingly and expressly adopted. Everything from fringe benefits to preparation of the payroll could be contracted out and provided on a discriminatory basis on the ground that "they did it, not us." The argument, if adopted, would allow an employer to totally absolve itself of responsibility under Title VII by contracting with third parties.

There is an obvious anomaly in petitioners' position on the meaning of the intent or motive requirement in Title VII disparate treatment cases. As the employer recognizes, *no* proof of discriminatory motive or purpose is required under Title VII where a facially-neutral employment policy has a discriminatory impact on one protected class. Pet. Br. at 24 n.14; *see, e.g., Teamsters*, 431 U.S. at 335-36 n.15. Thus, petitioners would concede that an employer could be liable for the discriminatory impact of a facially-neutral employment policy selected by someone else acting on the employer's behalf, even though the employer had no knowledge of, nor gave any approval to, that impact. Where, however, an employer explicitly and knowingly approves sex-based differentiation developed by a third-party contractor, petitioners' theory would permit an employer to escape liability. It is at least unlikely that Congress has erected a statutory scheme which turns so topsy-turvy ordinary notions of culpability and responsibility.

Finally, the employer posits another reason for denying intentional discrimination: "Arizona had no choice but to make available life annuities based on sex-distinct actuarial tables if it was to offer them at all since all available

insurance companies used such tables." Pet. Br. at 26. This argument is based upon petitioners' misstatement of the stipulated facts regarding nondiscriminatory annuity plans.

The record is silent as to the availability of nondiscriminatory plans. On the other hand, the state procurement documents requesting contract bids expressly solicit a breakdown of annuity payments by sex. Exhibit H to First Set of Interrogatories to Defendants with Answers, R. 12a. Thus, even if the only annuities currently used *in the industry* were sex-based, the employer here has foreclosed the development of a nondiscriminatory annuity plan for its employees through the use of the contract procurement documents that solicit contract bids from private companies solely on the basis of the sex of the employee.

Furthermore, the State of Arizona successfully maintains a mandatory nondiscriminatory retirement plan for all employees. Ariz. Rev. Stat. Ann. §§ 38-781.01 to -781.37 (West 1974 & Supp. 1975-1982). Indeed, it is questionable that an employer with 35,000 employees, J.A. at 6, could not have found a single insurance company willing to write a gender-neutral policy for its employees. For example, the University of Minnesota recently changed to a unisex pension plan for its employees through two private insurance companies. Chronicle of Higher Education, October 13, 1982, at 25, col. 2. There is, then, no factual predicate for the employer's assertion regarding the availability of alternatives; rather, the facts in the record, coupled with the available research, strongly suggest the contrary.

II.

THE EMPLOYER IS LIABLE FOR CREATING AND CONTROLLING A DISCRIMINATORY BENEFIT

A. *The Employer Created and Controls the Discriminatory Plan.*

The employer argues that the insurance carriers, and not the State of Arizona, are responsible for the use of sex-based actuarial tables. Pet. Br. at 11. The involvement of the state, petitioners argue, is purely "passive." *Id.* at 28-31.

There is, however, nothing passive about Arizona's involvement as the employer. Rather, as the court of appeals correctly stated, Arizona (1) *makes the selection* of certain companies as funding media; (2) *approves participation* in the plan; and (3) *deducts the appropriate amount* from the employee's salary. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 334 (9th Cir. 1982).

The employer's involvement extends even further. The employer prepares contract specifications and publicly issues procurement documents requesting sealed competitive bids for the state contract from interested companies, as prescribed by Arizona law. Ariz. Rev. Stat. Ann. §§ 41-729, -730, 41-1051 to -1056 (West 1974 & Supp. 1975-1982). It contracts directly with the insurance companies or financial institutions. Exh. 3-8. As the contract owner, the employer, and not its employees, has the power to exercise the rights, options, and privileges granted or permitted under the contracts. *See, e.g.*, Exh. 3, pp. 1-5, 13; Exh. 5, p. 2; Exh. 6R, p. 5; Exh. 7, p. 6. And, until the money is paid out to the employee, it is the employer, and not the employee, which holds title to the deferred funds. Exh. 10, p. 7; Exh. 11, p. 7.

From solicitation of the bids to the point the deferred wages are released and the retiree finally has possession of his or her deferred compensation, the involvement of the state as an employer is pervasive. The insurance companies participate for the convenience, and at the request, of the employer. The employer's attempt to evade responsibility on the basis of its allegedly passive participation is totally contrary to the facts in the record.

This is not a case, as the employer suggests, of attempting to hold a party liable for the acts of another. Pet. Br. at 12. Here, unlike *General Building Contractors Association, Inc., v. Pennsylvania*, 102 S. Ct. 3141 (1982), the employer established the plan, had knowledge of, and indeed encouraged, the discrimination that was explicitly contained in the contracts. The employer is liable because of its own independent actions.

Similarly, the employer's reliance on several decisions of this Court to support the proposition that an employer should not be held liable under Title VII because of conditions or obstacles "which were not created by the defendant and over which it had no control" is also misplaced. Pet. Br. at 17. In *Harris v. McRae*, 448 U.S. 297 (1980), this Court upheld the constitutionality of the Hyde Amendment that limited the circumstances under which the federal government would pay for abortions under the Medicaid Act. The Court stated, "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those [such as indigency] not of its own creation." 448 U.S. at 316.

In contrast, rather than refusing to remove an obstacle, Arizona "affirmatively offered a plan, better than that available for purchase by an individual, which discriminated against

women." *Norris v. Arizona Governing Committee*, 671 F.2d 330, 335 (9th Cir. 1982). Though the employer argues that this distinction is "semantical, not real," Pet. Br. at 19 n.11, the employer's development and implementation of a discriminatory plan is in no way comparable to the failure to remove an obstacle not of its own creation.

The employer also urges that *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), somehow relate to the issue of control. *Manhart* expressly rejected the argument that either the holding or the reasoning of *Gilbert* is controlling in this type of case:

> In *Gilbert* the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in *Geduldig v. Aiello*, 417 U.S. 484, the Court first held that the General Electric plan did not involve "discrimination based upon gender as such." . . . ***On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.***

Manhart, 435 U.S. at 715 (emphasis added) (footnote omitted).

For the same reasons, the employer's reliance on *Satty* must also fail. *See Manhart*, 435 U.S. at 710-11 n.20 & 716 n.29. In *Satty*, this Court held that an employer's policy of denying accumulated seniority to female employees returning from pregnancy leave violated Title VII, 434 U.S. at 139, but that the policy of not awarding sick-leave pay to pregnant employees is "legally indistinguishable from the disability-insurance program upheld in *Gilbert*." 434 U.S. at 143. Thus, in both *Gilbert* and *Satty*, the Court merely concluded that where there is no gender-based discrimination, there is no violation of Title VII. In contrast, here, as in *Manhart*, there is gender-based discrimination in the use of sex-segregated actuarial tables.

B. *There is No Open Market "Exception" to Title VII; Rather, the Statute Does Not Apply Outside the Boundaries of the Employer-Employee Relationship.*

Title VII has two primary statutory exceptions relating to sex discrimination. The first is a bona fide occupational qualification (bfoq). 42 U.S.C. § 2000e-2(e) (1976). Under this statutory provision, employers are permitted a limited exception to the proscriptions of Title VII where, for example, sex is clearly a qualification for the job. *Dothard v. Rawlinson,* 433 U.S. 321 (1977). The other limited exception under Title VII is the Bennett Amendment, section 703(h), which provides that differentiation in wages and compensation between men and women is lawful if it is authorized under the Equal Pay Act of 1963. 42 U.S.C. § 2000e-2(h) (1976). As the employer has implicitly conceded, neither exception applies to this case.

Rather, the employer seeks to engraft an additional exception onto Title VII. Seizing upon dictum in *Manhart,* the employer asks this Court to exempt discriminatory employment practices because such discrimination derives from practices in the marketplace that are not initially related to the employment context. There is nothing in this Court's opinions or the statutory language that would sanction this additional exception.

In *Manhart,* this Court stated:

> Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

435 U.S. at 717-18 (footnote omitted). Relying solely upon this language, and its misstatement of the fact to which the parties stipulated–that all companies in the plan, not all

companies in existence, use sex-based actuarial tables, J.A. at 10-12—the employer seeks to create an "open market exception." It argues that because all insurance companies use sex-based actuarial tables, the state is only reflecting the private market. The fallacies in this argument are three-fold. First, *Manhart* did not create an "open market exception." Second, as discussed *supra* at 24, nothing in the record shows that sex-neutral tables were unavailable or nonexistent. Third, Title VII does not allow an employer to avoid statutory responsibility by contracting out.

The language relied upon by the employer and amici as creating an open market exception is nothing more than a description of the boundaries beyond which Title VII does not extend. Title VII regulates aspects of the employer-employee relationship; Title VII does not regulate transactions in the open market outside of the employer-employee context. This Court's reference to the open market simply acknowledges that Title VII would not proscribe an employer's severance pay plan for employees upon termination. *See* Gold, *Of Giving and Taking: Applications and Implications of City of Los Angeles, Department of Water & Power v. Manhart*, 65 Va. L. Rev. 663, 674, 698 (1979). Thus, under *Manhart* an employer can set aside certain amounts for each employee, and, upon termination, that employee can go out on the open market and buy whatever he or she can obtain with the money.

Here the employer, and not the employee, went to the private marketplace and secured a discriminatory annuity plan and offered it to employees. As stipulated by the parties, between 1974 and 1979, only eight funding media have ever participated in the plan, J.A. at 7-9, three of which never even offered a life annuity. *Id.* Several companies no longer

participate. *Id.* Thus, the companies with which an employee can contract are limited, and are selected by the employer. There is nothing in the record to show that the Arizona plan contains all of the options, all of the companies, and all of the possibilities available on the open market.

The key with respect to this fringe benefit package is that it constitutes "compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1976). Therefore, Title VII applies, regardless of whether the employees could buy similar kinds of benefits on their own. Once an employer undertakes to provide a fringe benefit, it must do so in a nondiscriminatory fashion.

Thus, the task is to draw a line where the employment relationship ends and the open market begins. In this case, Congress has drawn that line. The point beyond which Title VII no longer takes effect is where no "compensation, terms, conditions, or privileges of employment" are involved. 42 U.S.C. § 2000e-2(a)(1) (1976). There is nothing in Title VII, or the decisions of this Court, that supports the line-drawing the employer suggests.

C. *The Availability of Nondiscriminatory Options Does Not Save the Discriminatory Option.*

The employer's plan offers three alternatives upon retirement. The first is a lump sum option which is sex-neutral. J.A. at 7-10. Alternatively, employees may select fixed monthly payments for a fixed number of months, an option that is also sex-neutral. *Id.* at 9. The final alternative is the life annuity based upon sex-segregated actuarial tables. *Id.* at 10, 12. As of August 18, 1978, 84% of the women participating in the plan had elected some form of future annuity option. *Id.* at 6.

The principal reason underlying the preference for the life annuity is obvious. As stated by the employer, the lump sum option subjects employees to immediate tax consequences and provides a reduced amount with which to purchase benefits on the open market. Pet. Br. at 15. "*If forced to purchase the annuity individually with a lump sum payout, the employee gets less for his or her dollar.*" *Id.* at n.9 (emphasis added). By opting for the lump sum an employee loses "the tax advantages which are the principal motivation for the plan." Brief of American Academy of Actuaries as Amicus Curiae in Support of Petitioners at 8. The other alternative, a fixed monthly payment for a fixed number of months, is no option at all for a woman (or a man) attempting to insure a steady income throughout retirement. The options offer little in the way of meaningful alternatives.

The employer has full control over the options selected by an employee. Although an employee can request investment in a particular option of a particular company, the employer has an absolute right to approve or reject both the choices of the investment as well as the payout option. Exh. 10, pp. 6, 8, 13; Exh. 11, pp. 5, 7, 12. Because the employer has an absolute veto power over the employee's selection, the options may not even be available to the employee.

Finally, no precedent under Title VII suggests that an employer is absolved of liability for discriminating against employees with respect to one option simply because there are other nondiscriminatory options available. To the contrary, such an argument closely resembles the argument rejected by this Court in *Connecticut v. Teal*, 102 S. Ct. 2525 (1982). There, this Court refused to relieve an employer of liability under Title VII for its discriminatory promotional examination where the " 'bottom line' result of the promo-

tional process was an appropriate racial balance." 102 S. Ct. at 2529. As stated by the Court:

> It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed.2d 657 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous." *Id.*, at 708, 98 S. Ct. at 1375.
>
> . . .
>
> Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired.

102 S. Ct. at 2535. Similarly, Title VII does not permit an employer to discriminate against a woman who desires to have a life annuity with all of the accompanying tax benefits, on the ground that concededly less attractive, albeit nondiscriminatory, alternatives are available to her.[16]

Today, fringe benefits come in a variety of forms. More and more, employers are offering cafeteria-style benefit packages to meet the particular needs and lifestyles of employees. *See* I.R.C. § 125 (Supp. III 1979). For example, employees may be given a choice of exchanging duplicate or unnecessary medical coverage for more money in profit-sharing plans. Employees may be given the choice of exchanging some profit-sharing for an extra week of vacation or exchanging unneeded benefits for day care services at a reduced rate or no cost.

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[16]Under the equal protection clause of the fourteenth amendment, this Court last term invalidated a sex-based classification despite the availability of nondiscriminatory alternatives. *Mississippi University for Women v. Hogan*, 102 S. Ct. 3331 (1982).

Many of these same or similar benefits are also present in the marketplace. Thus, if adopted by this Court, the clear implications of petitioners' argument are that an employer may offer a discriminatory benefit—one that discriminates, for example, on the basis of race, sex, or religion—*provided* there is at least one option that is nondiscriminatory. Such an exception would consume the rule and emasculate the application of Title VII to employer-offered fringe benefits.

III.

THE RELIEF GRANTED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS WAS PROPER.

The district court ordered the following remedy:

> The plaintiff, Nathalie Norris, on behalf of herself and for the class, is entitled to a summary judgment permanently enjoining the defendants from carrying out their obligations under A.R.S. § 38-871 *et seq.*, through the use of sex segregated actuarial tables, and for an order directing that annuity payments to female employees who have retired shall be equal to similarly situated male employees.

Norris v. Arizona Governing Committee, 486 F. Supp. 645, 652 (D. Ariz. 1980). The court of appeals affirmed the relief. *Norris v. Arizona Governing Committee*, 671 F.2d 330, 336 (9th Cir. 1982). The method of achieving equalization of benefits was not specified by either court.

The employer characterizes this relief as "in effect, retroactive in nature." Pet. Br. at 32 n.17. This is plainly incorrect. The relief awarded by the district court did not include retroactive relief. 486 F. Supp. at 652. Respondents subsequently moved to amend the judgment to include equalization of past payments, R. 25, and that motion was denied. R. 31. No appeal was taken.

The provisions of Title VII give a court broad discretion in fashioning a remedy for illegal discrimination. Upon finding that a violation of the Act exists, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1976). A purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Limiting damages to injunctive relief would not serve this purpose: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Id.* at 417

In *Manhart*, this Court declined to order retroactive relief, recognizing a limited instance in which "[t]he *Albemarle* presumption in favor of retroactive liability can seldom be overcome." 435 U.S. at 719. Realizing that its decision could have broad implications on existing pension and insurance plans, and believing that the "threat of a backpay award" was not necessary "to cause other administrators to amend their practices to conform to this decision," 435 U.S. at 721, the Court ordered purely prospective relief.[17]

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[17]Contrary to petitioners' claim that the "decision in *Manhart* was quite narrow," Pet. Br. at 10, the Court recognized that its decision would have significant consequences. *Manhart*, 435 U.S. at 720-23. Obviously, if this Court had intended its decision in *Manhart* to be narrowly construed, its notable caution in fashioning a remedy would have been unnecessary. *Id.* at 718-23. As stated by the Ninth Circuit, pension plan administrators doing business after *Manhart* "could no longer reasonably think that the distribution of unequal benefits did not violate Title VII." *Retired Public Employees' Association v. California*, 677 F.2d 733, 738 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. August 14, 1982) (No. 82-262).

The prospective relief ordered by the district court in this case is entirely consistent with *Manhart*. The court properly directed that future annuity payments to female employees who have already retired be equal to similarly situated male employees.

The employer's argument against the remedy echoes the argument on liability—the insurance companies, not the employer, are the culprits, therefore the remedy against the employer is inappropriate. For all of the reasons discussed above, and the reasons set forth below, this argument is equally unpersuasive in the context of a remedy.

For example, the employer cites numerous lower court decisions in support of its contention that because of the employer's passive involvement, the remedy in this case was inappropriate. Pet. Br. at 29-30. As discussed *supra* at 25-26, there is nothing passive about the employer's involvement. Thus, the cases relied upon by the employer are inapplicable.

Petitioners also argue that in *Spirt v. Teachers Insurance & Annuity Association*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791), an employer, in a similar challenge to a retirement plan, was simply enjoined from making contributions to any pension fund using sex-based mortality tables. Pet. Br. at 31. *Spirt* is one of several cases brought against the Teachers Insurance and Annuity Association (TIAA) and the College Retirement Equities Fund (CREF). *See also Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794). *Spirt* and *Peters*, unlike this case, posed the additional issue of who is an employer under Title VII. *Spirt*, 691 F.2d at 1063; *Peters*, 691 F.2d at 238.

In reliance upon the Ninth Circuit Court of Appeals decision in *Norris*, the court in *Spirt* upheld the lower court's determination that (1) TIAA-CREF was an employer under Title VII that (2) could be enjoined from using sex-based mortality tables and (3) ordered the use of gender-neutral mortality tables. 691 F.2d at 1063, 1066. In addition, Long Island University, the other named defendant, and the university at which the plaintiff taught, was enjoined from contributing to any pension fund using sex-based mortality tables. *Id.* at 1066. The broad relief extended, then, to TIAA-CREF and the University, both deemed to be employers under Title VII. Similarly, in this case, the relief properly extends to the employer, the State of Arizona. Both cases correctly require the equalization of benefits. As stated by the court of appeals in *Norris*:

> The [district] court has not said that the companies may not use sex-segregated annuity tables. Nor has it joined the companies as defendants or required the companies to pay the adjusted annuities. All the court has done is tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man.

Norris, 671 F.2d at 333.

The employer's attempt to extricate itself from liability on the basis of the involvement of the insurance companies has been rejected by other courts. *Peters*, 691 F.2d at 238 ("A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which 'happen' to discriminate against women. . . . None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees." (Emphasis original.)); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978) (without the affirmative and active participation of the em-

ployer the program could not operate).

Finally, the employer argues that the relief ordered "overturns the nondiscriminatory judgment of the state legislature that the plan was to operate 'without cost or contribution from the state . . . .' " Pet. Br. at 31, *citing* Ariz. Rev. Stat. Ann. § 38-871.C.1 (West Supp. 1975-1982); *see also* Pet. Br. at 32. In response, the court of appeals correctly stated:

> [T]he fact that Arizona did not want to pay for the plan does not insulate it from making payments to equalize the treatment received by women. If this were not the case, a state could insulate itself from Title VII or § 1983 damages merely by saying it did not intend for its taxpayers to be burdened.[18]

Norris, 671 F.2d at 336. Furthermore, a state law which conflicts with a federal law is preempted by the federal law. U.S. Const. art. VI, cl. 2. Therefore, an employer cannot shield itself from liability on the basis that state law conflicts with Title VII.

The relief granted by the district court was well within the discretion allowed under Title VII.

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[18] For the same reason, the employer's reliance on *Ford Motor Co. v. EEOC*, 102 S. Ct. 3057 (1982), is misplaced.

CONCLUSION

Under the deferred compensation plan designed by the State of Arizona, women receive smaller monthly payments under the annuity option than similarly situated men. The court of appeals correctly found this to be a violation of Title VII under *Manhart* and upheld the prospective relief granted by the district court. The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted this 8th day of January, 1983.

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Throughout their briefs, respondents and their amici contend that the instant case is controlled by the holding in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). They claim that because petitioners "control" and "created" the deferred compensation plan, they should not be able to avoid liability simply because the life annuity benefits are provided by independent insurance companies. (R.B.[1] 25-27)

Respondents confuse the issue: Petitioners created the deferred compensation plan; they did not create or develop the challenged life annuities offered by the private insurance companies.

Although respondents complain that the actuarial tables upon which the life annuities are calculated are "based exclusively on the sex of the employee" and do not incorporate "bona fide mortality variables" (R.B. 3), petitioners were not responsible for those tables nor do they represent themselves as having any special expertise in the use of actuarial data. The only act for which petitioners can be held responsible is their act of offering their employees those life annuities made available by private insurance carriers in the open market. Since all insurance companies available to them used sex-based actuarial tables—and respondents, who carry the burden of proof, do not cite any evidence to the contrary—petitioners had no choice but to offer sex-based annuities if they were to offer annuities at all. Intentional discrimination cannot be premised upon a lack of choice.

Respondents' (and their amici's) argument should be seen for what it really is: An attempt at social engineering through the courts to change the presently legitimate use of sex by

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[1] Respondents' brief will be abbreviated as "R.B.," and Petitioners' brief will be abbreviated as "P.B."

private insurance companies as a basis for risk classification.[2] The fact that respondents disapprove of present insurance practices does not justify the invocation of Title VII to condemn an employer which only made available that which the private insurance market offered.[3]

I

PETITIONERS DID NOT DISCRIMINATE BECAUSE THEY HAD NO CHOICE BUT TO CONTRACT WITH INSURANCE CARRIERS USING SEX-BASED ACTUARIAL TABLES

Respondents have attempted to create the appearance of an issue of fact by contending that petitioners have misrepresented the meaning of the stipulation that "all [actuarial] tables presently in use provide a larger sum to a male than to a female of equal age. . . ." (J.A. 10.) Petitioners contend that the stipulation—which is unlimited in scope—meant, as it says, that "all tables presently in use" by insurance companies then available to Arizona made such a distinction; respondents contend that this stipulation meant only that the companies participating in the Arizona Deferred Compensation Plan used such tables.[4] However, this alleged issue of fact is really a red

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[2] This is made even more apparent by the fact that several amici briefs are dedicated to the issue of the propriety of the use of sex-based actuarial tables by the insurance industry. This is not a relevant issue under Title VII or in this case, and will not be addressed here.

[3] Title VII is not a proper means by which to challenge practices of the insurance industry since it does not govern relations between an insured and an insurer. *See Manhart*, 435 U.S. at 718 n.33. Instead, respondents' proper recourse was to file a complaint with the appropriate Insurance Commissioners, challenging those practices which they deemed illegal or inequitable.

[4] However, it was specifically stipulated two pages later in the Joint Stipulated Statement of Facts that "all of the companies participating in the State Deferred Compensation Plan used sex-segregated actuarial tables." (J.A. 12) There would have been no need to make the second stipulation if the first already covered that fact.

herring. Whether the stipulation is interpreted as contended by petitioners or as construed by respondents makes no real difference to the ultimate outcome of this case.

First, if petitioners' interpretation is correct and the parties did agree that all insurance companies offering life annuities used sex-segregated tables, then petitioners cannot have been guilty of discrimination. In that event, petitioners had no opportunity to act otherwise than they did, *i.e.*, to offer the sex-based annuities made available by the open market. It would obviously be illogical and unfair to conclude that petitioners' act of offering such annuities was "more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

Moreover, the absence of unisex annuities constitutes a "legitimate, nondiscriminatory reason" for petitioners' failure to include such an annuity in the options offered. This being so, respondents had the burden of proving "by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). Respondents did not make, and could not make, any such showing.

On the other hand, if the stipulation is interpreted as argued by respondents, *i.e.*, " [t]he record is silent as to the availability of nondiscriminatory plans" (R.B. 24), respondents failed to make out a prima facie case. This Court has made it very clear that the plaintiff in a Title VII case alleging discriminatory treatment has the burden of proving a prima facie

case of discrimination, as well as "[t]he ultimate burden of persuading the trier of fact that the defendants intentionally discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). In order to make out a prima facie case, it was respondents' burden to prove that an insurance company which provided life annuities based on unisex mortality tables was available to the State of Arizona and this respondents utterly failed to do. In a typical case of disparate treatment, where the plaintiff contends that she has not been hired or promoted because of sex, the burden which plaintiff must meet has been stated by this Court as follows: "[t]he plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. 248, 253; *accord, McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Just as such a plaintiff must prove that the job was "available" before she can make out a prima facie case of discrimination in a typical case, so, too, respondent in this case had the burden of proving that a unisex annuity was "available" to Arizona which was not offered to her. If no job is available in a traditional case of discrimination, it cannot be inferred that plaintiff was discriminated against because she was not given a job. Similarly, if no unisex annuities were available to Arizona, it cannot be inferred that women were discriminated against by Arizona because it failed to offer such annuities. The record is completely devoid of any evidence that

such a unisex annuity was available.[5] Thus, respondent failed to satisfy her burden of proving a prima facie case.[6]

In any event, this alleged dispute as to the meaning of the stipulation is a diversion from the underlying fact that all insurers available to Arizona did in fact use sex-based tables. At the hearing on respondents' motion for summary judgment in the district court, respondents' counsel (then Mr. Meyerson)

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[5] The only purported evidence of unisex tables that respondents adduce —which is outside the record—is a recent adoption by the University of Minnesota of a unisex plan; however, this cannot disturb in any way the undisputed state of the record that there were no private insurance companies available to Arizona which offered unisex annuities in 1975 when respondent selected a life annuity option under the deferred compensation plan and her claim arose.

Likewise, the alleged evidence adduced by the amicus Lawyers' Committee for Civil Rights Under Law is irrelevant and misleading. They state that in a telephone call, Lincoln National Life Insurance Company stated that "in some cases" if the business was "large enough," it would be willing to provide group life annuities based on unisex tables. First, what Lincoln might do today is irrelevant to what was available to Arizona in 1975 when respondent's claim arose and she filed her charges with the EEOC. Second, the evidence is misleading since it presumably refers to a mandatory plan where members cannot withdraw because of dissatisfaction with unisex rates, unlike the instant plan. This affects the availability of unisex rates. Finally, this "evidence"—which is also outside the record—lacks foundation. The conditions and rates at which the insurance product would be offered are not mentioned. The fact that an insurer would offer a life insurance policy to an 80-year-old woman dying of cancer is meaningless without the price and conditions of the offer.

[6] Nor can respondents and their amici avoid their burden of proof by characterizing proof of the absence of unisex tables as an affirmative defense for which petitioners bear the burden of proof. (*See* Amicus Brief for the Lawyers' Committee for Civil Rights Under Law, p. 19.) *Burdine* establishes that the ultimate burden of proof remains with the plaintiff at all times. 450 U.S. at 253. After a plaintiff establishes a prima facie case, an employer only has a burden of production.

admitted that he was not aware of any carriers which would be prepared to offer a unisex table in Arizona:

> MR. MEYERSON: I do not know whether in the State of Arizona there is a carrier who is prepared to offer a plan that would be required if the Court would rule in favor of the plaintiff's motion.

October 22, 1979 Hearing, R. 11.

Moreover, the amicus brief of the American Council of Life Insurance (ACLI) states that it is "not aware of any private insurance company which offers an annuity plan which does not calculate benefits according to sex-specific mortality tables." (ACLI brief, p. 10, 24; *accord,* Amicus Brief of the Equal Employment Advisory Council, p. 2.) Further, in *Manhart* itself, an affidavit from an actuary was submitted which stated that "no tables have yet been developed which measure life expectancy for annuity purposes on a unisex basis." *EEOC v. Colby College,* 589 F.2d 1139 (1st Cir. 1978), quoting affidavit submitted in *Manhart.*[7]

Finally, respondents and their amici argue that there is no evidence "that this large employer, with 35,000 employees, could not have negotiated a contract with a company to use sex-neutral tables." (R.B. 8, 24; ACLU Brief, p. 13) The argument is misleading. First, respondents had no duty to attempt to change that which the marketplace offered. *See Harris v. McRae,* 448 U.S. 297, 316 (1980). Second, in 1978 (three years after respondent filed her claim) only 1,675 employees of the 35,000 state employees had elected to participate in the deferred compensation plan, and *only a portion of the 1675* chose the life annuity option (J.A. 6). Thus, the bargaining leverage is missing which respondents would seek to imply. Moreover, it was respondents' burden to prove that petitioners could have negotiated such a contract. *See Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 253. They did not meet that burden.

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[7] Even the Equal Employment Opportunity Commission, which submitted a brief to the Ninth Circuit, appeared to concede the absence of any private insurance companies which used unisex mortality tables in Arizona. (EEOC Brief, p. 14.)

II

PETITIONERS CANNOT BE HELD LIABLE FOR DISCRIMINATORY TREATMENT UNDER TITLE VII WHERE THERE IS A FINDING THAT PETITIONERS DID NOT INTEND TO DISCRIMINATE

In their opening brief, petitioners established that where an employee alleges less favorable treatment on the basis of sex under Title VII, proof of discriminatory motive is critical. Accordingly, the court of appeals was incorrect in concluding that proof of intent was unnecessary. (P.B. 23-28) Petitioners are not liable under Title VII in this case because the district court made an express finding that petitioners did not engage in purposeful discrimination.

Respondents claim that petitioners' argument is premised upon "a fundamental misunderstanding." (R.B. p. 18) Respondents state that the district court's determination that petitioners did not engage in purposeful discrimination cannot be elevated to a finding of fact because it was made "in the context of its understanding of the equal protection clause of the fourteenth amendment and not with regard to Title VII legal standards." (R.B. 19 n.13; *see also* ACLU Brief, p. 25.) However, the standard of proof under the Equal Protection Clause of the Fourteenth Amendment and for disparate treatment under Title VII is the same. *See Teamsters v. United States,* 431 U.S. 324, 335-336 n.15 (1977). It is where the disparate impact test under Title VII is at issue that the standard of proof under the Fourteenth Amendment differs from Title VII. *Arlington Heights v. Metropolitan Housing Corp.,* 429 U.S. 252, 265 (1977); *see Washington v. Davis,* 426 U.S. 229 (1976).[8]

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[8] Respondents also claim that the district court's finding that petitioners did not engage in purposeful discrimination should be considered a conclusion of law and not one of fact on the ground that the stipulated facts are

(Footnote continued on next page)

Respondents further claim that the only discriminatory intent needed under Title VII is "knowingly treating all women differently." (R.B. 19, 20) However, Arizona did not treat women differently. Nor is its awareness or knowledge of the consequences of the insurers' practices tantamount to its intent to treat them differently. *See Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979). This Court has consistently held that in disparate treatment cases[9], the employer must be found to have *intentionally* discriminated, *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and that the "central focus of inquiry" must be whether the employer is treating some people less favorably than others "because of" their sex. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, *quoting Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977).

As this Court stated in *Personnel Administrator of Mass. v. Feeney,* 422 U.S. 256 (1979):

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of the consequences. [Citation omitted.] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

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silent as to the state of mind of the employer. To the contrary, the district court was entitled to infer the lack of intent from the record, *see Arlington Heights v. Metropolitan Housing Corp., supra,* 429 U.S. at 265-266, and indeed so stated: "From the facts agreed upon, it is clear that this classification was not made by the defendants but rather are the results of the insurers' judgment. This is somewhat less than the purposeful and invidious gender-based discrimination necessary for a finding that the compensation plan violates . . . the Fourteenth Amendment." 486 F. Supp. 645, 651. (See April 14, 1980 Hearing. R. 8) Respondents have not challenged this finding on appeal.

[9] Respondents in their brief have agreed this is a disparate treatment case. (R.B. p. 18-24).

Personnel Administrator of Mass. v. Feeney, id., 442 U.S. at 279.[10]

Hence, the critical issue is whether Arizona selected life annuities "because of" an illegitimate consideration, such as sex, *Furnco Construction Corp. v. Waters, supra*, 438 U.S. at 577, and not simply whether it was aware of the consequences of the insurers' practices. Here, Arizona offered life annuities which used sex-based tables because they were the only annuities available to it at the time, not because the annuities were based on sex-distinct actuarial tables. Indeed, even if a unisex annuity had been available to Arizona at the time respondent brought her claim, Arizona would still have had an opportunity under Title VII to "articulate" a nondiscriminatory reason why it did not select that annuity before a court could conclude that Arizona offered only sex-based annuities "because of" the effect on females.

Respondents also claim that petitioners' position on intent is incorrect because "[t]his Court has never imposed a requirement that an employee or applicant show *why* the employer engaged in a practice of using racial or sexual criteria." (R.B. 21) Petitioners agree that the issue is not "why", but "whether" the employer used racial or sexual criteria in the challenged practice. However, knowledge that a third party engages in a practice based on an employee's race or sex does not mean that

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[10] Respondents claim that *Feeney* is not relevant to the issue of intent because it involved a facially neutral policy which was challenged under the Fourteenth Amendment, not Title VII. (R.B. 22 n.15) However, petitioners have only cited *Feeney* as authority for the meaning of discriminatory intent which, as demonstrated earlier, is the same element of proof necessary to prove disparate treatment under Title VII. *Compare Teamsters v. United States, supra*, 431 U.S. 324, 335-336 n.15, *with Arlington Heights v. Metropolitan Housing Corp., supra*, 429 U.S. 252, 265-266. Furthermore, this Court has ruled that the concept of discrimination which has evolved from court decisions involving the Equal Protection Clause of the Fourteenth Amendment is a "useful starting point" for purposes of interpreting the term "discrimination" under Title VII. *General Electric Co. v. Gilbert, supra*, 429 U.S. 125, 133.

the *employer* is treating that employee differently because of her race or sex.[11]

Respondents also claim that they have carried their burden of proof of discriminatory intent because the employer has the burden of articulating a legitimate, non-discriminatory reason for its action and "[t]he record in this case contains no evidence of any lawful reason for using sex-segregated tables, nor could any legitimate reason be articulated under this Court's decision in *Manhart* and this plan." (R.B. 22) However, respondents confuse the issue: Arizona does not "use" sex-based tables. The insurers do that; Arizona only *offers* life annuities which the insurers base upon such tables. Since the insurance carriers have not been sued, the record obviously would not "contain evidence of any lawful reason" for the use of sex-based tables by the carriers. If respondents meant to contend that no lawful reason exists for Arizona's offering annuities which are based on sex-based actuarial tables, they are quite mistaken. To the contrary, the record expressly provides that all actuarial tables in use are sex-based and therefore Arizona had no choice but to offer sex-based life annuities if it was to offer them at all. The lack of choice in the marketplace is certainly a lawful reason for not offering that which does not exist.

Respondents claim that the effect of petitioners' position on Title VII could be "profound" because it would allow employers to "contract out for various services relating to terms and conditions of employment and then claim that they did not 'intend' the discriminatory programs which they knowingly and

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[11] The ACLU misstates petitioners' position on intent and claims that petitioners' position is that they should not be held to have intended to discriminate if their motives were benign. (ACLU's Brief, p. 24) That is not petitioners' position. Petitioners' position is that intent to discriminate requires that *an employer* take an action, whether that act is done for malign or benign reasons, "because of" an employee's gender. Here, Arizona contracted with private insurance companies "because" it wanted to offer life annuities, not "because" the life annuities were based on sex-distinct actuarial tables.

expressly adopted." (R.B. 23) This contention is specious. If non-discriminatory services are available, it can be inferred that the employer intended to treat its female employees differently by its failure to offer them—unless the employer can articulate a non-discriminatory reason for its choice and the plaintiff cannot prove that the reason is a pretext. *See McDonnell Douglas Corp. v. Green, supra,* 411 U.S. 792, 804. However, where an employer contracts for a service and can receive no better benefits for females because the open market does not furnish them, it clearly does not intend to treat them differently. *See General Electric Co. v. Gilbert, supra,* 429 U.S. at 139 n.17. For this reason, all of the analogies cited by the ACLU at pages 14-15 of its amicus brief are flawed, if not sophistic.[12]

Respondents also argue that where "an employer explicitly and knowingly approves sex-based differentiation developed by a third-party contractor, petitioners' theory would permit an employer to escape liability." (R.B. 23) Again, the petitioners did not approve, either knowingly or explicitly, of the use of sex-based tables by the insurance companies and indeed do not

[12] The ACLU claims that this action is analogous to a case where an employer offers a form of guaranteed mortgage financing to senior employees through a specified local bank and then seeks to avoid responsibility under Title VII for the bank's discriminatory refusal to lend money to black or women employees on the grounds that it was a third-party decision. However, there, the employer's purposeful *choice* of a bank with discriminatory policies would constitute treating black or women employees differently because banks with nondiscriminatory lending policies were available to it on the open market. Likewise, the ACLU's argument that an employer offering membership in an employer-selected eating club could not defend itself against a charge of violating Title VII by arguing that the refusal of the club to admit black or women employees was a third-party decision is not apposite. There, again, if the employer did not offer membership in other clubs available on the open market which treated employees equally, its intentional choice of a club which it knew treated women or blacks differently, would amount to a purposeful act to treat employees differently on the basis of race or sex. However, where an employer provides what is available to it on the open market (or at least what it knows to be available), it cannot be properly accused of intending to treat them differently on the basis of race or sex since it had no other choice.

consider themselves qualified to render an opinion as to the advantages and disadvantages of sex as a classification in actuarial tables. Petitioners' position is simply that where they had no choice but to offer annuities based on sex-based tables, they cannot be held to have intended to treat women differently. Intentional discrimination cannot be premised upon a lack of choice.

III

UNDER THE REASONING OF THIS COURT'S DECISION IN *MANHART*, PETITIONERS ARE NOT LIABLE UNDER TITLE VII

A. Title VII Relates To The Conduct Of An Employer, Not Third Parties.

Respondents argue that "here, as in *Manhart*, there is gender-based discrimination in the use of sex-segregated actuarial tables." (R.B. 27) Such an argument glides over the issue of *who* is responsible for the use of the sex-based actuarial tables. This Court noted in *Manhart* that Title VII governs the conduct between an employer and its employees, not between third parties and the employees, unless the third parties can be considered the employer's agents or corporate shells. 435 U.S. at 718 n.33[13] Arizona, unlike the employer in *Manhart*, can only be held responsible for making available life annuities, but not for using sex-based tables.[14]

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[13] The insurers cannot be considered Arizona's agents or corporate shells. (*See* P.B. 12.)

[14] Accordingly, respondents are incorrect when they contend that in *Manhart*, "this Court held that retirement or pension plans which classify women on the basis of sex rather than individual characteristics are illegal under Title VII . . ." (R.B. 8) This overlooks the fact that in *Manhart* this Court did not broadly condemn all such retirement and pension plans but expressly limited its holding to employer-operated plans: "[a]ll that is at issue today is a requirement that men and women make unequal contributions to an *employer-operated* pension fund." [Emphasis added] 435 U.S. 702, 717. This is a sensible limitation since Title VII prohibits only employers, not third parties from discrimination. 42 U.S.C. §2000e-2(a)(1).

Implicitly recognizing that they cannot hold Arizona liable for the conduct of the insurance carriers, respondents argue that "the employer created a discriminatory program," and that "the employer concedes that the plan classifies on the basis of sex." (R.B. 9, 21) However, the plan itself is sex-neutral and non-discriminatory. It is the actuarial tables, which petitioners did not control or develop, of which respondents complain.

Nonetheless, respondents argue that because the employer's control over the plan is "extensive," it is also responsible for the insurance carriers' use and development of the actuarial tables. Respondents cite as evidence of the employer's control that the "deferred employee funds remain assets of the employer until payment," that they are "subject to the claims of the employer's general creditors," that "[t]he employer retains complete legal title" to the funds, and that the "employees have only a future, contingent legal claim for payment." (R.B. 5, 25)

However, this control is unrelated to the development of the life annuities or the use of the sex-based actuarial tables, of which respondents complain. Indeed, it is only when the *employee* acquires an absolute right to payment that the use of sex-based tables comes into being. Further, Arizona's limited control over the funds (which are placed into the investment of the employee's choice) is necessary in order for the plan to obtain the desired tax deferral. *See* 26 U.S.C. § 457(b)(6). To qualify, a deferred compensation plan must provide that all amounts of compensation deferred under it and all income attributable to it will remain solely the property and right of the State, subject only to the claims of the State's general creditors. 26 U.S.C. § 457(b)(6). However, this control does not relate or reach to the insurance companies' use of sex-based actuarial tables for life annuities.

Respondents next argue that petitioners are responsible for the insurance carriers' use of the actuarial tables because "the state procurement documents requesting contract bids expressly

solicit a breakdown of annuity payments by sex," and in a *non sequitur* contend that "the employer here has foreclosed the development of a non-discriminatory annuity plan for its employees through the use of the contract procurement documents that solicit contract bids from private insurance companies solely on the basis of the sex of the employee." (R.B. 24, 26)

Respondents' evidence of "solicitation" (R.B. 3) consists of an innocuous inquiry to insurance companies as to what type of monthly annuity the bidding insurance companies would provide for both a male and a female, age 65, under various circumstances. This inquiry cannot in any way be construed as "encouragement" of any form of actuarial table or "foreclosure" of the development of unisex tables. A bidding company could have fully complied with the request by providing a unisex rate. Arizona simply sought information concerning benefits for both males and females to determine which insurers provided the most lucrative benefits for all concerned, and would have been derelict in its duty to do otherwise.

Accordingly, Arizona is not responsible for the use of sex-based actuarial tables by the independent insurance carriers. Since the independent insurance carriers' use of such tables for life annuities is not prohibited by Title VII or elsewhere, the fact that an employer has made them available to its employees cannot transform a legitimate practice into a prohibited one. Neither *Manhart* nor common sense holds that offering an employee the opportunity to deal with a third party is "discriminating against" an employee.[15]

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[15] The ACLU argues that Arizona's "affirmative active participation" in adopting the plan "constitutes involvement sufficient to hold it responsible under Title VII," citing *Spirt v. TIAA-CREF*, 691 F.2d 1054 (2nd Cir. 1982), *cert. pet. filed*, Docket No. 82-791 (Nov. 9, 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1141 (1st Cir. 1978); *Sobel v. Yeshiva University*, 477 F.Supp. 1161, 1166 n. 4 (S.D.N.Y. 1979); and *Peters v. Wayne State University*, 691 F.2d 235, 238 (6th Cir. 1982) *cert. pet. filed*, Docket No. 82-794 (Nov. 10, 1982). None of these cases held employers responsible simply because they contracted with private, independent insurance companies. In

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B. The Instant Plan Falls Squarely Within The Open Market Exception Stated in *Manhart* And Is Therefore Lawful.

Respondents argue that petitioners' reliance on the *Manhart* open market exception is flawed for several reasons. First, respondents claim that *Manhart* did not create an open market exception. (R.B. 29) Respondents state that the open market exception only means that "Title VII does not regulate transactions in the open market outside of the employer-employee context." (R.B. 29)

Respondents' construction of the open market exception is so narrow as to be tautological: Of course, Title VII does not regulate transactions "outside of the employer—employee context." Petitioners submit that the open market exception is premised on the fact that Title VII applies only to the actions of an employer, not to third parties in the marketplace. A long line of authority indicates that an employer's liability does not extend to conditions of the marketplace which it did not create. *See Harris v. McRae*, 448 U.S. 297 (1980); *General Electric Co. v. Gilbert*, 429 U.S. 125, 139 (1976); *Briggs v. City of Madison*, 536 F. Supp. 435, 447 (W.D. Wisc. 1982); *Barone v. Hackett*, 28 FEP Cases 1765 (D.R.I. 1982). (See P.B. 17-23.)[18]

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Sobel, the district court simply concluded that the action could not be decided on summary judgment and in dictum indicated that *Manhart's* prohibition against unequal contributions to an employer-operated plan did not control the case because of the "difficulty in applying the legalistic rationale of *Manhart* to a pension plan which is funded through a private insurance company." 477 F. Supp. at 1166. The other cases involve TIAA and CREF which were found to "exist solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees." *Spirt v. Teachers Insurance and Annuity Association, supra*, 691 F.2d at 1063. In *EEOC v. Colby College*, the court of appeals simply vacated the district court's dismissal of the complaint and stated that "we do not rule that *Manhart* requires a ruling on liability . . . ." 589 F.2d at 1146. The court in *Peters* found the employer not liable under Title VII.

[18] Respondents claim that "the employer asks this Court to exempt discriminatory employment practices because such discrimination derives from practices in the marketplace that are not initially related to the

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Respondents' second argument against the open market exception is that nothing in the record shows that sex-neutral tables were unavailable. (R.B. 29) That has already been addressed in section I. In any event, respondents had the burden to prove the availability of unisex annuities, and cannot shift the burden to petitioners. *See Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. at 253.

Moreover, it appears that even if unisex life annuities had been available in the marketplace in 1975 and petitioners had offered them, along with all of the other offerings of the open market, respondents would still complain of a violation of Title VII. Respondents argue that "Title VII prohibits an employer from offering a discriminatory fringe benefit regardless of whether the employer also offers nondiscriminatory alternatives." (R.B. 9) Hence, respondents' real complaint is not that petitioners failed to offer unisex annuities but that they did offer sex-based annuities, i.e., they offered what was available on the open market and that paid more per month to males than to females. Accordingly, respondents are really attacking the open market. Under respondents' theory (as well as that of the Ninth Circuit, *see* 671 F.2d at 335), the availability of unisex annuities is simply irrelevant.

Respondents' third argument is that "Title VII does not allow an employer to avoid statutory responsibility by contracting out." (R.B. 29) Respondents do not cite any authority for this proposition and also misstate the issue. This case is not one of an employer who *intends* to discriminate and decides to contract out the responsibility, but a case in which an employer did not intend to discriminate but intended to make available to all employees a benefit (life annuities) and offered the only

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employment context." Respondents misstate petitioners' position. It is not that discrimination "derives" from the marketplace, but that an employer is not responsible for conditions in the marketplace which it did not create and over which it had no control. Respondents' attempt to distinguish *Harris v. McRae* (R.B. 26-27) was anticipated by petitioners and fully rebutted in the opening brief at page 19 n.11.

type available on the open market. Despite respondents' protests, they never indicate (nor could they) that an insurer was available to Arizona in 1975 which used sex-neutral tables.

Finally, respondents complain that the insurance companies with which petitioners contracted do not mirror the open market because Arizona did not contract with *all* of the companies on the open market or provide *all* of the possibilities available to it. It is not so important to mirror the open market as to represent it. ***The material fact is that respondents did not prove that they could have done better on the open market than with the companies which petitioners offered.***

Petitioners have done no less than required by this Court in *Manhart* to qualify for the open market exception: Petitioners set aside equal contributions for similarly situated employees, and each retiree was able to purchase the largest benefit which the open market offered—whether the employee chose to do that through the lump sum offered by Arizona or through the available insurance companies which provided the largest benefits available in the open market.

C. Unlike *Manhart*, In The Instant Case Contributions Are Equal.

Respondents incorrectly state that "petitioners in this case implicitly recognize" that the fact that *Manhart* involved unequal contributions while the instant case involves unequal benefits "is of no decisional consequence." (R.B. 13-14) Petitioners submit that there is a material distinction between unequal monthly *contributions*, as in *Manhart*, and unequal monthly *benefits*, as here.

Where a woman is required to make a higher monthly contribution than a man, both her *monthly* contributions and her *total* contributions over the term of her employment will be higher; hence, her aggregate and monthly salaries are always less than those of a comparable male. In contrast, where a woman receives lower monthly benefits (but contributions are

equal as here), whether her *total* retirement benefits will be more or less than those of a comparable man depends upon her longevity; only her monthly payments will always be less than that of a man because in the experience and judgment of the annuity insurer she is expected to receive such benefits for a longer period of time.[17] Since the purpose of a deferred compensation plan is to defer current income and to recoup it at a later date when the tax consequences will presumably be lighter, whether a female or male will recoup all of their deferred compensation will depend solely on their longevity, not their sex.

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court held that General Electric's disability benefit plan (which excluded pregnancy) did not involve discrimination based upon gender because the plan instead divided potential recipients into two other groups: pregnant women and non-pregnant persons. 429 U.S. at 135. Similarly, in this case, the plan divides potential recipients into three different groups, not on the basis of sex, but: (1) persons who will recoup less income than they deferred into the plan, (2) persons who will recoup the amount of income which they deferred, and (3) persons who will recoup more income than they deferred. Each of these groups will be composed of both men and women, and whether any given person will fall into any particular group will be determined on the basis of his or her longevity. Therefore, the amount of retirement income received by each employee is not based on gender as such.

In *Manhart*, this Court rejected the argument that the different contributions exacted from men and women were based on the factor of longevity, rather than sex, because all

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[17] For this reason, it is misleading to compare the monthly benefits of males and females rather than total retirement income. An employee who selects a life annuity has chosen a product which pays a certain monthly amount, not for a fixed period but for life (an indefinite period of time). A male will receive x amount for his expected life (y), while a woman will receive u amount for her expected life (v). Although $x \times y$ has the same value as $u \times v$, comparison between x and u is meaningless where y differs from v.

women took home less pay and the determination of who would make a higher contribution was ultimately based on sex. All women were treated differently, i.e., were required to make greater contributions than men, regardless of longevity. However, in the instant case, women do not contribute more than similarly situated men, and whether any given employee will receive more or less *total* retirement income than he or she contributes cannot be determined on the basis of sex. Unlike *Manhart*, where all women were required to contribute more, in this case whether a woman will recover more income than a similarly situated male depends solely on her longevity.[18]

Accordingly, the ultimate receipt of retirement benefits over an employee's lifetime will depend upon his or her longevity, unlike *Manhart* where the receipt of less take-home salary always depended solely on one's sex. Petitioners submit that there is thus a material distinction between unequal contributions and unequal benefits, at least where a deferred compensation plan is involved.[19]

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[18] Indeed, the appendix to the amicus brief of the American Council of Life Insurance evinces that females, on the average, will recoup approximately ten percent more in aggregate annuity benefits than similarly situated males.

[19] In *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), the Sixth Circuit held that the payment of unequal monthly pension benefits did not violate Title VII because, *inter alia*, the actuarial value of the fund for similarly situated male and female employees was equal. Accordingly, the court held that the plan differentiated between men and women on the basis of longevity. The other lower courts which have rejected the distinction between plans providing for unequal contributions and unequal monthly benefits have done so without much discussion. *E.g., Spirt v. Teachers Insurance and Annuity Association, supra; Retired Public Employees Association of California v. California*, 677 F.2d 733, 735 (9th Cir. 1982); *EEOC v. Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978).

CONCLUSION

For all the foregoing reasons, petitioners request that this Court reverse the judgment of the Court of Appeals and order that judgment be entered in their favor.

Respectfully submitted,

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

v. *Petitioners,*

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE

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Respondents.

**On Writ of Certiorari to the
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BRIEF OF AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE

Consent to the filing of this brief has been given by counsel for both sides. Letters to this effect have been filed with the Clerk.

INTEREST OF THE AMICUS

The American Academy of Actuaries (the "Academy") is a national accrediting organization for the actuarial profession. It was formed in 1965 by three existing national actuarial organizations—the Casualty Actuarial Society, the Conference of Actuaries in Public Practice, and the Society of Actuaries. The Academy and these three founding organizations or their predecessors have represented the actuarial profession in the United States

for over 90 years. The Academy currently has over 7,000 members.

The actuarial profession plays a central role in the design and administration of employee retirement plans.[1] We are, accordingly, in the unique position of being able to offer the Court information about the structure of such plans and to describe the potential effect of this Court's decision on the various types of plans.

INTRODUCTION AND SUMMARY: THE OBJECTIVE AND STRUCTURE OF THIS BRIEF

In *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), this Court held that the contributory defined benefit pension plan of the City of Los Angeles violated Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). That plan was unusual in that it required women to contribute, during their working years, larger amounts than were required of similarly situated men. The Academy filed a brief *amicus curiae* in that case that urged neither affirmance nor reversal. We represented to the Court that a decision that the City's plan violated Title VII would not have a widespread effect if it were limited to the particular kinds of provisions then before the Court. An affirmance in the case now before the Court, however, would have major impact on a great variety of plans currently in use.

Since *Manhart*, there have been five decisions by Courts of Appeals dealing with these other types of plans.[2] All

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[1] Over 85% of those persons who have qualified as "enrolled actuaries" under the Employee Retirement Income Security Act of 1974 (ERISA) are members of the Academy. That Act provides, for defined benefit pension plans, that an enrolled actuary must submit an annual statement which reports on critical financial information about the plan.

[2] We take the liberty of omitting citations that will be readily available in the many briefs that will be filed in this action.

but one has concluded that a retirement plan that provides for lifetime benefit payments in unequal monthly amounts to similarly situated men and women violates Title VII. Without regard to the correctness of these decisions, they reflect a less than complete understanding of the nature of the several types of retirement programs and of the ramifications of the decisions. These plans have strikingly different characteristics that may be relevant to deciding how Title VII should be applied in the context of employee retirement plans.

Part I of this brief, accordingly, describes the major types of retirement plans and the distinctions that are made between men and women in the administration of these plans. It concludes with a description of the features of the plan at issue here that we regard as material.[3]

Under one major type of plan, if benefits in the form of lifetime monthly payments are to be provided, they are virtually always provided by the purchase of annuities from an insurance company. Insurers, in fixing the prices of these annuities, and of insurance products generally, employ procedures known as the pooling and classification of risks. Part II of this brief describes why actuaries take account of the fact that women as a class live longer than men as a class in connection with these procedures.

In Part III we examine several ways in which Section 703(a) of Title VII might be applied to the provision of lifetime benefits under employee retirement plans. We set out briefly the arguments that have been advanced in favor of and against each of these interpretations. We describe the impact that the adoption of each of these

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[3] Regrettably, many of these plans are complex, and any summary description is subject to the infirmity that it is necessarily incomplete. Although running the risk of making statements that may not always be wholly accurate, we have omitted factual detail or qualifying comment where irrelevant to the issues in this case.

interpretations would have on the employers, actuaries, and insurance companies that administer these plans and on the employees and retirees covered by them.

Finally, in Part IV we consider the relief that has been granted by the courts below in this and some other cases.

ARGUMENT

I. DESCRIPTION OF THE MAJOR TYPES OF RETIREMENT PLANS

Congress has sought to encourage private employers to sponsor retirement plans for their employees and particularly plans that provide benefits in the form of periodic payments that continue as long as the employee lives.[4]

Women as a class live longer than men as a class. The difference is significant and is not decreasing.[5] Accordingly, it costs more to provide life incomes or annuities to women than it does to provide similar benefits to men who retire at the same age. Quite different accommodations have been made to this fact under different types of plans.

A. Defined Benefit Plans

In a defined benefit plan, the principal undertaking on the part of the employer is to pay a specified benefit to the employee upon retirement. Although the employee cannot determine in advance the precise number of dol-

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[4] For example, for non-governmental plans "qualified" under § 401 of the Internal Revenue Code, contributions made in a given year by an employer are deductible from the employer's income but are not includible in the taxable income of employees until distributed as benefits.

[5] The life expectancy of a woman born in 1920 was 54.6 years. A man born the same year had a life expectancy of 53.6 years. By contrast, the life expectancy of a woman born in 1979 was 77.8 years, compared to 69.9 years for a man born in that year. 1981 STATISTICAL ABSTRACT OF THE UNITED STATES at 69.

lars he or she will receive, the formula by which that amount will be determined is set forth in advance.[6]

Because the benefit to be received is the focus of these plans, contributions made by the employer are generally not segregated into individual employee accounts. The amount of these contributions is based upon an actuarial valuation of how much money must be contributed during the working years of the employees covered by the plan in order to fund the promised benefits. It is not particularly meaningful, therefore, to ask what amount is being contributed on behalf of a particular employee, or what amount is being contributed on behalf of women as opposed to men. However, the actuary will take into account the individual characteristics of employees, such as age and sex, in advising the employer what his contribution should be to fund the promised benefits.[7]

Virtually all defined benefit plans provide for a "normal" retirement age and for a "normal" benefit in the form of monthly payments for the life of the employee that are identical for similarly situated men and women. Plans subject to ERISA are required to provide the option of a joint and survivor pension that will continue until the deaths of the employee and his or her spouse and that will automatically be provided in the absence of a contrary election by the employee. Many plans also give employees the option to retire earlier or later than the normal retirement age.

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[6] A plan might provide, for example, that the annual pension will equal 2 percent of the sum of the employee's total earnings; or a similar percentage of the employee's final year's earnings multiplied by the number of years of employment.

[7] The accumulated contributions plus the earnings thereon are held for the sole benefit of the employees. The amount of the pension received by the employees is not a function of the rate of earnings, however. Rather, the amount of the pension is simply a function of the formula referred to above. A higher rate of earnings results in reducing the employer's cost, not increasing the employee's benefits.

If an optional benefit is elected, many plans provide for an adjustment of the amount of the monthly payment. The amount of the adjustment is frequently determined with the objective of making the cost of the optional benefit approximately equal to the cost of the normal benefit. For this reason, if a joint and survivor pension is elected, the amount of the adjustment depends, among other things, upon whether the retiring employee is a man or a woman. Similarly, early or late retirement may result in different adjustments for men and women, as was the case in *Retired Public Employees* v. *State of California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed Aug. 14, 1982*, 51 U.S.L.W. 3212 (Sept. 28, 1982) (No. 82-262). The difference results when the greater longevity of women is taken into account in determining the optional benefit.[8]

Under a defined benefit plan, while the contributions made by the employer each year are intended to provide adequately for the promised benefits, the amount contributed is an estimate based upon an anticipated rate of earnings, employee turnover, mortality rates, inflation, and other factors. The ultimate cost to the employer is uncertain.[9]

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[8] In addition to the optional benefits described above, some defined benefit plans provide a number of additional forms in which benefits can be taken. These include (a) a life income or annuity paying a monthly amount for as long as the employee lives but with payments guaranteed for a minimum period (e.g., 10 years) even if the employee dies before the end of that period; (b) monthly payments over a stated number of years irrespective of when the employee dies; and (c) a lump sum option.

[9] This uncertainty in the past has been more acceptable to larger corporate employers. Smaller corporations and partnerships have turned to defined contribution plans to give them better control over what the cost of their pension plan will be. Recently some larger employers have sought to change from defined benefit to defined contribution plans in order to achieve better control over pension costs. See, *e.g.*, BUSINESS WEEK, November 8, 1982 at 85.

B. Defined Contribution Plans

Defined contribution plans specify the amount of the contributions made by the employer rather than the level of benefits to be provided to the employee upon retirement.

Contributions are made and accounts are maintained on behalf of each individual employee. It is very rare for a defined contribution plan to provide that different contributions will be made for male and female employees who are otherwise similarly situated.[10] At the time of retirement, therefore, a man and a woman with identical years of employment and salary histories, whose accounts have been invested in the same way, will have accumulated identical amounts in individual accounts.

These plans often provide for the payment of the accumulated amount to the employee in a lump sum. They also generally provide for lifetime monthly payments. In the latter case payments are almost always provided through the purchase, by the plan administrator, of an annuity from an insurance company. Since insurance companies recognize that women live longer than men, they provide smaller periodic payments to women than to men for the same accumulated amount.

C. The Plan at Issue in this Case

The plan at issue in this case is a type of defined contribution plan, known as a deferred compensation plan. It offers the employees of the State the option, on a strictly voluntary basis, of deferring the receipt of a portion of their compensation. Each participating employee designates the amount by which his or her current salary will be reduced. Each employee then desig-

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[10] Retirement plans may or may not be "contributory" and provide for employee contributions in addition to those of the employer.

nates which of the funding media selected by the State (including an insurance company, a mutual fund, and a credit union) will invest the deferred compensation. In order to secure the tax advantages which are the principal motivation for the plan, however, the funds remain assets of the State and are subject to the claims of the State's general creditors.[11]

When an employee reaches retirement age, the amount credited to his or her account may be withdrawn in full as a lump sum. If the employee prefers to have a lifetime annuity, the insurance company designated under the plan will assume the contractual obligation to make the annuity payments. Alternatively, the employee may elect a lump sum and purchase an annuity from some other insurance company, but if that is done the employee forgoes part of the tax advantage that results from the plan.[12]

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[11] Deferred compensation plans such as this one offer significant tax advantages to the employee. The amounts deferred are not subject to tax at the time of deferral, so that the full pre-tax amount of this compensation can be invested in the funding medium (i.e. $200 pre-tax per month rather than $140 for a person in the 30% bracket). Because the funds are still technically the funds of the State, the earnings on these deferred amounts are not taxed at the time they are earned. When the employee retires and receives his or her benefits under the plan, these amounts (including both the compensation deferred and the earnings thereon) are taxable to the employee—but often at rates that are lower than the rates applicable to the employee's income during his or her working years.

[12] If an employee has had his or her account held in the mutual fund, for example, and the funds are transferred to the insurance company at retirement, they are still not deemed to have been received by the employee and the employee is taxed on the monthly annuity payments as received. If the funds are transferred to an insurance company not designated under the plan, however, the funds are deemed to have been received by the employee at that point and are taxable in full.

This plan is not the State's retirement plan for its employees. The role of the State in the administration of this plan is a very limited one. It selects, at the outset, funding media for the plan. It reduces each employee's salary to the desired level and transfers the difference to the particular funding medium the employee has designated. But it is barred by statute from contributing any money to the plan on its employees' behalf. The State was thus not in a position to accept the financial uncertainty of funding life annuities. It had no general funds available in the event its particular employees happened to live longer than the mortality tables predicted. As a consequence, the only way the officials responsible for the plan could comply with the authorizing statute and offer this benefit was by transferring the risk to an insurance company by the purchase of annuity contracts.

The next section of this brief describes how an insurance company is able to accept this risk.

II. THE POOLING AND CLASSIFICATION OF RISKS

The risk that the insurance company accepts when it undertakes to write life annuities arises because it is impossible to predict in advance how long any single individual will live. But if this risk is assumed with respect to a group of persons, the rate and frequency of deaths within that group can be reliably predicted based on the past mortality experience of similar groups. This permits the insurer to set the amount of monthly annuity as members of the group retire at a level that will not exhaust the total fund available for the payment of annuities until the last person in the pool has died.

Although the insurer must in this way substitute the predictability of the group for the uncertainty surrounding the life span of the individual, the focus on the individual is not lost. Through the process of risk classification, the insurer evaluates the likelihood that a particular individual will have greater longevity than the average. This is accomplished by evaluating the

specific characteristics of the individual which correlate statistically with longevity. The two most common in connection with annuities are sex and age.

There are two important reasons for this practice.

First, it is a principle of long standing in the insurance context that fairness and equity are achieved when individuals are classified according to the likelihood that they will experience the risk being insured. Under this view, fairness and equity are achieved when each individual under an employer-sponsored retirement plan receives benefits that are "actuarially equivalent" to the benefits received by others. In the present context, the monthly amount paid to a woman is lower than that paid to a similarly situated man. The difference is in an amount that will make equal in value the two income streams, which differ in duration because of the greater longevity of women.

Second, risk classification is essential to the successful operation—to the financial soundness—of an insurance arrangement. Where people have the right to decide whether or not to purchase insurance or to accept a life annuity, the similar treatment of persons with different risk characteristics would invite low-risk persons to decline coverage or to decline the annuity in favor of alternatives which provide them benefits more commensurate with the risk they represent. A frequently cited example of the danger of ignoring this "adverse selection" phenomenon is found in the experiences of the early "burial societies." These societies paid a benefit upon the death of one of their members out of premiums and assessments that were set without regard to the age of the individual member. As the average age of the members increased, and mortality experience worsened, the frequency of assessments increased and the established associations were unable to attract the younger members necessary to keep down the level of payments. Ultimately, these insurance mechanisms collapsed, leaving many mem-

bers without the protection for which they had contributed over a number of years.

Another consequence of requiring by law that an identical premium be charged or an equal periodic benefit be paid for groups involving different risks is that it creates incentives that may not be desirable. Insurers that are more successful in attracting the low risk group will realize greater profit. They may seek to do this, for example, by focusing their advertising so as to reach primarily members of the low-risk group. Market pressures may also discourage other companies from assuming the higher risks at all, with a resultant narrowing of the breadth of insurance coverage that is available to persons in the high risk group.

The extent to which adverse selection is a significant factor varies considerably depending upon the type of insurance that is offered and the existence of other factors that affect the choice of the persons in the insured group. It does not operate at all if there is no choice. If the individuals in a group of insureds do have an election but it is not one that they are likely to exercise, then the problem posed by adverse selection may not be significant. In general, however, experience has shown that where an opportunity for adverse selection is provided, a substantial number of persons may take advantage of that opportunity.

III. INTERPRETATION AND APPLICATION OF SECTION 703(a) OF TITLE VII

A. An Actuarial Perspective on the Theories Advanced on this Issue

We offer here, in summary fashion, brief comment from an actuarial perspective on several issues that have been raised in this and related cases.

In *Manhart* the fact that a woman received a lower take-home pay than a similarly situated man was regarded as unlawful discrimination on the basis of sex.

A much more difficult question is whether a non-contributory defined contribution plan—or a contributory plan where equal contributions are required of similarly situated men and women (so that take-home pay is equal)—would violate Title VII if the monthly lifetime payments received by women were smaller than those received by men.

Those who would answer this question in the affirmative argue that a monthly payment of $90 cannot be regarded under any circumstances as equal to a monthly payment of $100. Those who would answer the question in the negative argue that the compensation to the employee, whether viewed at the time of retirement or, during the employee's working years, as incremental additions to each wage payment, is the right to receive a stream of monthly payments that will continue until he or she dies. This stream of payments has a present or discounted value which, in situations where it is necessary, can be and is ascertained.[13] Such income streams are, of course, bought and sold in the market as annuities and, when they are, a given purchase price will buy a stream of level monthly payments that are lower for a woman than for a man. The two streams of payments are actuarially equivalent in value, however, and that is why they cost the same amount. That is also why, the argument runs, men and women should be regarded as receiving equal compensation.

A number of different responses are made to this argument.

1. *Sex as a predictor of longevity.* It is contended by some that sex is not a reliable basis for predicting future longevity. Although conceding that in the past women as a class have lived longer than men, they assert that this difference will disappear as women engage in

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[13] It is done, for example, for tax purposes. See, e.g., Treas. Reg. § 20.2031-10(b) (1970), 26 C.F.R. § 20.2031-10(b) (1982).

more hazardous occupations and share more widely with men habits such as smoking.

The available evidence does not support this contention. Women have made greater gains in longevity over this past century than have men.[14] A recent U.S. census report projects that those gains will continue through the first half of the 21st century notwithstanding the report's assumption that women will increasingly enter the work force during this period.[15]

2. *The availability of other indicia of longevity.* A second argument urges that actuarial equivalence that is based upon classification by sex should be rejected as a measure of equality because it does not consider other factors, in addition to age and sex, that are known to correlate with longevity—smoking habits, departures from normal weight, the longevity of parents and grandparents, etc. At best, these persons argue, actuarial equivalence based on sex is a sham; at worst it is a pretext for discrimination based on sex.

This argument has a superficial appeal. But we think it is wrong. Two classes of persons with observable differences in longevity may be treated as a single class if the relevant differences, though identifiable, are relatively small. The minor "unfairness" involved may be outweighed by the added expense of treating the two cases differently. Small differences do not give rise to significant adverse selection and so are acceptable from a business standpoint. Further, some of the alternative grounds for classification are also fairly difficult to apply. For example, persons who smoke heavily may deny it.

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[14] See *supra* note 5.

[15] Female life expectancy is expected to rise from 78.3 years in 1981 to 83.6 years in the year 2050, while male life expectancy is expected to rise from 70.7 years to only 75.1 over the same period. U.S. BUREAU OF THE CENSUS, POPULATION ESTIMATES AND PROJECTIONS (Series P-25, No. 922, October 1982).

What is more important, however, is that were these other longevity factors employed, sex would continue to be a significant factor in accounting for longevity differences. So far as the available evidence shows, for example, women who smoke live longer than men who smoke.[16] Any insurer who, in fixing the prices for annuities, used these other factors but ignored sex would, in a competitive market, be subject to adverse selection as men sought the more attractive benefits offered by other companies free to take sex into account. If these or other factors provided a superior alternative to sex as a classification, insurers would have every business incentive to employ them.[17]

3. *The Overlap Theory.* Yet another argument that the provision to men and women of benefits that are actuarially equivalent should not satisfy Title VII has come to be called the "overlap theory." It was first advanced by Professors Bergmann and Gray.[18] They point

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[16] The United Nations Demographic Yearbook reports, with limited exceptions, significantly lower mortality rates for women than for men throughout the world, in a wide variety of cultures. UNITED NATIONS DEMOGRAPHIC YEARBOOK 1970, TABLE 20 at 710-729 (1971). Where mortality studies are limited to individuals who work for pay outside the home, the differential between male and female mortality is greater than for individuals who do not. Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 EMPLOYEE BENEFITS JOURNAL 1 (1976). An analysis of data gathered in 1965 in California concluded that after adjusting for 16 risk factors (including occupation, smoking, alcohol use, physical activity, church and group membership, and life satisfaction), male mortality continued to exceed female mortality. In fact, the analysis found that the combined effect of adjusting for all 16 variables was to increase the difference in relative mortality risk for men and women. Wingard, *The Sex Differential in Mortality Rates: Demographic and Behavioral Factors*, 115 AMER. JOURNAL OF EPIDEMIOLOGY 205-16 (1982).

[17] For example, a handful of companies began to classify successfully risks on the basis of smoking habits. Offering lower premiums to non-smokers is now a widely used life insurance practice.

[18] Bergmann & Gray, *Equality in Retirement Benefits: The Need for Pension Reform*, 8 CIV. RTS. DIG. 25 (1975).

out that in a group made up equally of men and women all 65 years of age, say 1000 of each, for about 84 percent—or 840 men and 840 women—the years of their deaths can be matched one for one. However, eighty men will die in the early years of the group unmatched by deaths among the women, and eighty women will die in the later years unmatched by deaths among men. The argument asserts that the use of sex-distinct tables allows the savings in annuity costs for the 8 percent of the group consisting of men who die early to be entirely monopolized by men, while the extra burdens imposed by the 8 percent of the population consisting of women who die later are entirely borne by the women.

The persons who make these assertions conclude that this is inherently unfair and inequitable. The flaw in this contention is that it looks at mortality retrospectively. Purchase rates for annuities, however, must be fixed prospectively. It cannot be determined in advance who will fall into the unmatched long-lived group. The probability that any woman chosen at random will fall into the unmatched long-lived group—to which relatively large aggregate payments will be made—is .16, while the probability that any randomly chosen man will fall into that group is zero. It is equitable, therefore, to charge each woman a higher amount for the same benefit.[19]

These arguments also fail to recognize the financial significance of the important fact that the unmatched male deaths occur early and the unmatched female deaths occur later. For example, in a retirement pool of 1,000 females and 1,000 males, each receiving $10,000 a year for life beginning at age 65, it would take $41 million more to provide the benefit for females than for males.

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[19] The unsoundness of the concept may also be demonstrated by looking at an analogous example. If the deaths of a large group of 60-year-old women were to be matched against the deaths of a group of 65-year-old women, a similar overlap of 80.7 percent would exist. Yet few would argue that it is inherently fair to charge 60-year-old women the same price for life insurance or annuities as is charged 65-year-old women.

The arguments, finally, relate only to the fairness or unfairness of providing actuarial equity. The conclusion drawn by the proponents of this theory, that unisex mortality tables should be employed, ignores the resultant adverse selection discussed at pages 10-11, *supra*, and 18-19, *infra*.

B. The Probable Impact of the Court's Decision

In Part IV of this brief, we discuss the question of whether the Court's decision, if it is one that makes necessary a change in existing practices, should be retroactive or only prospective. In this section we predict, as best we can, what the practical impact will be on the various types of plans of a Court decision adopting one or another of the various interpretations of Title VII that will be urged upon it. For this purpose we make the assumption that any relief granted by the Court would be prospective in nature and that actuaries would continue to be able to classify prospective insureds by their sex when fixing the prices charged for life insurance and annuities.

Although this case could be reversed on rather narrow grounds, a broader ruling on reversal or on affirmance would almost surely apply *a fortiori* not just to other deferred compensation plans like this one but also to other types of defined contribution plans and possibly to defined benefits plans as well. Therefore, we deem it appropriate to set out for the Court the impact of alternative resolutions on these other kinds of plans.

1. *If equal monthly payments are mandated*

a. *Defined contribution plans.* Plans that provided *only* lifetime pensions could be administered so as to provide equal monthly payments without regard to the sex of the retiring employee and still carry out the employer's original objective of fixing its costs in advance. The amounts accumulated for each retiring employee could be used, as they are today, to purchase annuities. In fixing

the prices for those annuities, actuaries of the insurance companies that chose to continue to participate in this market would have to utilize mortality tables that are appropriate for each particular plan.[20] These would be "unisex" tables in the sense that the monthly benefit derived using the table would be the same for a similarly situated man and woman. But in developing the unisex table for each plan, the actuary would still have to take into account whether the annuitants will be primarily men or primarily women and in what proportions. An undertaking to furnish annuities to an employer whose retiring employees are likely to be made up of 90 percent men and 10 percent women must use a different table than the table that must prudently be used if the employees were 60 percent women and 40 percent men. Thus even a "unisex" table would reflect the differing mortality experience of men and women.

In addition, we would expect with such a plan that the current practice of guaranteeing annuity purchase rates long in advance would likely have to be modified, so that as the composition of each employer's work force changed, mortality tables could be adjusted and the level of monthly payments made to employees retiring after that date modified accordingly.

Plans that offer an election between a lump sum payment and an annuity upon retirement would be harder to handle, because of adverse selection. Sponsors of these plans might respond by eliminating one or the other of the options. Dropping the annuity option would defeat a principal objective of the Congress in granting favorable tax treatment to employer-sponsored pension plans—to encourage employers to provide life annuities as a supplement to Social Security benefits.[21] In the case of de-

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[20] See *infra* pages 18-19 for the reasons that might lead some insurers to withdraw from the market.

[21] Employees are likely to object to the elimination of the lump sum option, which provides them with desirable flexibility.

ferred compensation plans, such as that involved in this case, a substantial tax advantage would be lost if the annuity option were to be dropped.

If both options are retained, an insurance company desiring to continue in this market would have to fix annuity rates that took into account not only the sexual composition of the work force but also the probability that there would be extensive adverse selection. The insurance company chosen by the employer cannot ignore this latter factor because once it begins using unisex tables, men close to retirement can be expected to seek more attractive arrangements by electing the lump sum option and then purchasing from other insurance companies annuities that would be priced using sex-distinct tables. These would of course provide the men with larger monthly payments.

To respond, the actuary for the plan's insurer might well have to use a mortality table that assumed that most of the employees electing annuities under the plan would be women. The result of all this, therefore, might be that retiring women would receive annuities under the plan with monthly amounts that were not materially better than are now provided using existing sex-distinct tables. Men would continue to receive larger benefits but with the additional expense of transferring their lump sum benefit to an insurance company outside the plan.

The impact of mandating equal monthly payments for these plans could be even more far-reaching. Because insurers now use sex in their risk classification process, they need not be concerned about the mix of men and women who purchase annuities from them. An insurer required to use unisex rates, however, must assume the financial risk that the sex distribution of its annuitants will differ materially from that of the mortality table it used for pricing its product and determining benefits. There may be inconsistencies with other state and federal laws and regulations that will be difficult to resolve. More

generally, the prohibition of business practices that have valid economic justification often results in market dislocations that cannot wholly be predicted in advance. Some insurers may choose to withdraw from this market altogether.

b. *Defined benefit plans.* A decision that equal monthly payments are mandated would have little effect upon defined benefit plans so far as the "normal" pension benefit is concerned, since this form of benefit already pays equal monthly amounts to similarly situated men and women. However, if this Court in *Retired Public Employees* v. *State of California*, No. 82-262, *supra*, (petition for certiorari pending) were to decide that equal monthly payments are mandated by Title VII for optional benefits as well, this would prohibit the frequently employed although not universal practice of using sex-distinct annuity tables in computing the amounts payable under those options.

Actuaries would continue to take into consideration the sexual composition of the work force and, in addition, statistical data concerning the extent to which men differ from women in electing the available options. In computing the benefits payable under the options, they would use a mortality table appropriate to the sexual composition of the work force under the particular plan.[22] This would mean that the benefits paid under various plans might differ. To take one example, a 65 year old male or female employee of employer X, whose spouse is also 65, and who is entitled to a normal pension benefit of $1,000 a month, might be entitled to a joint and survivor pension of $875. A similarly situated employee of employer Y with the same $1000 a month normal benefit might be entitled to a joint and survivor pension of $925 per month. But the men and women employed by each employer would be treated identically.

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[22] This would not be possible in plans with few participants. A prudent actuary for such a plan might well feel compelled to anticipate that each employee will elect the most costly option.

For those defined benefit plans which provide a lump sum benefit or for benefits payable for a fixed number of years, the amount of these benefits would prudently have to be set at a level that was the actuarial equivalent of the normal pension for women. If they were set at a higher level the likely result would be that many men would elect the lump sum benefit and purchase annuities from an insurance company, thereby increasing the employer's cost. It can be expected that many employers would prefer to drop these optional forms of benefits.

2. If actuarial equivalence using sex-based classifications is mandated

a. *Defined contribution plans.* If the Court were to decide that actuarial equivalence using sex-distinct annuity tables was mandated by Title VII, thereby restricting its decision in *Manhart* to the narrow facts of that case—unequal take-home pay violates Title VII—defined contribution plans could continue to be designed and administered much as they are today. Women electing an annuity option would receive monthly payments lower than those received by men unless and until the difference in the longevity of the two classes disappeared or narrowed considerably.

b. *Defined benefit plans.* A decision that actuarially equivalent pensions are required under defined benefit plans would have serious consequences. At present similarly situated men and women who are covered under defined benefit plans receive normal pensions of identical monthly amounts which are, accordingly, not actuarially equivalent. A decision that women should be given a normal pension that is the actuarial equivalent of the normal pension now given to men would pay them substantially lower benefits than they now expect to receive and might impair contractual rights to such benefits. A decision that men should receive normal pensions that are the actuarial equivalent of the normal pensions now provided to women

would impose very significant new costs upon employers. Either decision is, as a matter of fact, practically precluded because of the inherent structure of a defined benefit plan.[23] Although not an issue in this case, it is an issue that is not far distant from that in *Retired Public Employees*, No. 82-262, *supra*, and we feel obligated to advise the Court of the possible ramifications of an opinion in this case that is phrased without awareness of this possible consequence.

3. *If equal contributions by the employer are mandated*

a. *Defined contribution plans.* These plans would be little affected by an interpretation of Title VII that mandated only that the employer's contributions into the plan for similarly situated men and women be equal. Virtually all of these plans already follow this practice.[24]

b. *Defined benefit plans.* An "equal contribution" interpretation of Title VII makes little sense in the context of defined benefit plans since there is no real "contribution" on behalf of any particular employee or group of employees under these plans. The focus of these plans is instead upon the benefits that are payable upon retirement.

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[23] It would either require adopting a benefit formula based upon sex (*e.g.*, 2% of aggregate salary for men and 1.92% of aggregate salary for women) or determining the normal pension benefit for employees of one sex and providing employees of the other sex with the actuarially equivalent normal benefit.

[24] This interpretation would not focus on the payments received by the employee under a life annuity since it is not the employer who provides these payments. Each employee's account is a separate one. For the employer to take the amount credited to a particular employee and give in exchange the employer's promise to make payments for life would, in effect, be entering into the business of insurance. This is exactly what the employer and particularly the smaller employer decides not to do by adopting a defined contribution plan.

4. *If different obligations are mandated for different types of plans*

There may be a consideration that is material to the decision of this Court that has largely been ignored in the extensive commentary that has followed the *Manhart* decision. If the issue ultimately comes down to what is "equal" compensation, then one might look at the differing nature of the plans for any guidance it provides on this issue. If this is done, the striking difference between various types of plans may suggest an interpretation of the statute that is somewhat different for each major type of plan.

a. *Defined benefit plans.* As we pointed out in our earlier description, the contributions made by the employer under a defined benefit plan are not made by individual employee or even by groups of employees (*i.e.*, men and women). Consequently, an interpretation of Title VII that focused on the contributions of the employer and tried to determine whether they were nondiscriminatory would be very difficult if not impossible to apply.

An interpretation that looks to the benefits received is more consistent with the structure of defined benefit plans, which focuses on the pension the employee will receive when he or she retires. The interpretation of Title VII, in this context, would seem to call for identical monthly payments, at least for the "normal" pension benefit. Moreover, as *Manhart* has already held, this requirement could not be undercut by requiring unequal contributions from men and women.

The issue is not as clear with respect to the optional benefits under these plans. For larger plans, if identical monthly payments are required, employers could provide desirable optional benefits, thereby increasing the flexibility available to employees under the plan, and could still fix the amount of these benefits so that the employer

would neither incur any substantial additional cost nor save any money as the result of the election. This could be accomplished with the same practices but also the same problems as described at pages 19-20. For smaller plans, where reliable estimates of cost are much harder to make, and for plans which include optional lump sum benefits, requiring identical monthly payments would have a much greater disruptive effect than would be true for larger plans.

b. *Defined contribution plans.* Under these plans, the focus is not upon the benefits that will ultimately be received by the employee. Defined contribution plans are structured around what the employer contributes on a periodic basis during the employee's working years—contributions credited to the employee's own individual account and invested in a manner over which the employee often has considerable control. An interpretation of Title VII that requires that contributions be equal for similarly situated men and women would be consistent with the structure of these plans.[25]

C. The Plan Before this Court

If the substance rather than the form of the Arizona plan is viewed as controlling, the fact that Arizona is regarded, for purposes of federal income taxation, as the

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[25] The understanding of both employees or employee unions and employers—the parties to the compensation arrangement—as to what constitutes "equal compensation" might also be a consideration that bears upon how Title VII should be interpreted in this context. While there are no studies available and no polls have been taken, it may be a fair inference that men and women covered by a defined benefit plan, who are not knowledgeable about the employer's contributions or the funding mechanism, understand that they will receive identical wages and an identical monthly pension. Employees covered by a defined contribution plan are told about their employer's contributions and know that the identical amounts set aside for men and women will be the source of their benefit. It could be argued that those common understandings support the interpretation described above.

legal owner of the amount of the compensation that is deferred until it is actually received by the employees may be entitled to very little weight. Arizona, before adopting the plan, had agreed to pay its employees certain salaries. Participation in the plan was voluntary. If an employee chose to participate, he or she designated the amount by which his or her salary would be reduced. Arizona did not pay the participating employees one cent of additional compensation. Its contribution was merely to collect the salary reductions, transmit them to the funding media selected by the employee, and keep records. In this context, Arizona might well be regarded as having paid its employees simply the wages to which they were originally entitled plus the costs of administration. Those amounts were provided without discrimination between men and women.

Arizona did offer its employees a means of facilitating the purchase of annuities, in order to enable them to extend the tax deferred feature of the arrangement past their retirement dates. Those annuities were paid in different monthly amounts for similarly situated men and women. Whether this limited involvement is distinguishable from the open-market purchase of annuities said by the Court in *Manhart* not to violate Title VII we leave to others.

If this Court holds that the *Norris* plan violates Title VII, then the issue of the form of the relief will remain to be decided.

IV. THE APPROPRIATENESS OF THE RELIEF GRANTED BY THE COURT

The relief granted by the District Court in this case and affirmed by the Court of Appeals directed in part that "annuity payments to female employees who have retired shall be equal to similarly situated male employees." 486 F. Supp. 645, 652 (D. Ariz. 1980). Both courts seemed to contemplate that this relief would be

retroactive, in that it would apply to employees currently receiving benefits. Equality of payments could be achieved, consistent with the contractual obligations of the insurer, only by "topping off"—raising benefits paid under a particular option to the level of the higher paid sex.[26] Such relief has in fact been ordered in *Retired Public Employees* v. *State of California, supra*.[27]

If this Court were to affirm the decision below, and thereby adopt both an equal monthly payments rule and a rule favoring retroactive relief involving "topping off" existing benefits, its decision would apply *a fortiori* to defined contribution and defined benefit plans as well. Because "topping off" requires an increase in benefits unforeseen when the assets that support a plan were

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[26] The annuity payments to both men and women could be adjusted to a point somewhere between the higher monthly amounts previously paid to one and the lower amounts paid to the other—using a mortality table appropriate for the plan and its particular mix of men and women. This form of relief probably could not be implemented, however, because current annuitants have enforceable contractual promises by the insurance company that existing payments will continue to be made. For a similar reason, achieving equality by lowering the levels of monthly payments now made to the favored sex down to the level of the less-favored sex would also be barred.

[27] There, the plan provides equal monthly annuity payments to similarly situated men and women who retire at age 60. Where such employees retire early, however, the women receive slightly higher benefits, and, conversely, in the case of late retirement, the men receive slightly higher benefits. The relief ordered was to increase the payment of all benefits to the level of the most favored employees. This relief was made retroactive to the date of this Court's decision in *Manhart*, requiring a lump sum retroactive adjustment very much like the back pay award that this Court rejected in *Manhart*. But even if the district court's order were effective only from the date of its own decision, the order would still require a change in the benefits of employees who have already retired.

set aside, such relief would in fact require a very large additional infusion of capital into a great number of plans. The impact on individual plans could range from negligible to the point that the continuation of the plan would be brought into doubt. For some plans, this increased burden could result in the termination of the plan. The cost to retirement plans as a group has been estimated at anywhere from in excess of $1 billion to several times that amount annually.

We have noted that employers electing defined contribution plans tend to be those employers (often of rather modest size) for whom it is extremely important to control their pension costs. Retroactive "topping off" relief would wholly frustrate this objective. As to deferred compensation plans such as the plan in this case, the required additional funds could only come from the employer. Yet the very essence of the plan was that it was to be funded wholly out of voluntary contributions by the employees, with the State merely administering the plan. We should note that Arizona responded to the *Norris* decision by simply discontinuing the annuity option.

Should the Court conclude that the Arizona deferred compensation plan is in violation of Title VII, the granting of relief only on a prospective basis avoids the financial consequences described in the previous two paragraphs, and would be consistent with the position taken by this Court in *Manhart*. Because Arizona offered a plan in which it had a limited role, it could reasonably have concluded that its arrangement came within the open market exception articulated in *Manhart*. As this Court said in *Manhart*, "[W]e must recognize that conscientious and intelligent administrators of pension funds, who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed

that a program like the Department's was entirely lawful." 435 U.S. at 720.[28]

There are several ways prospective relief can be defined. One form of prospective relief would require that the payment of benefits be altered only for employees who retire after the date of the Court's order.[29] The benefits for all employees now still working would be based on unisex factors. If such an order were made, widespread and substantial adjustments of currently anticipated benefits would be required, and the cost of the benefits in many instances would be increased. A less significant impact would result if only benefits that accrued after the date of the Court's order, or benefits based on contributions made after that date, were required to be altered. Under such an order, part of the employees' benefits would be based on unisex factors and part on sex-distinct factors. The least impact would result if the Court's order applied only with respect to employees hired after the date of the order.

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[28] As this Court has previously recognized in fashioning remedies under Title VII that may affect "the expectations of innocent parties," the courts "must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair, and what is workable.'" *Teamsters* v. *United States*, 431 U.S. 324, 375 (1977), *quoting Lemon* v. *Kurtzman*, 411 U.S. 192, 200-201.

[29] For some plans (*e.g.*, those that have purchased units of annuity with each contribution), any reduction in benefits might encounter existing contractual obligations to persons not yet retired.

CONCLUSION

We do not take any position as to how Title VII should be applied in this or in any other case. We recognize that, in resolving the issues presented by this and related cases, the Court must consider a number of factors some of which are not dealt with in this brief and are not matters on which actuaries have particular expertise. We do suggest, however, that the nature and structure of the retirement plans involved and the practical consequences that may result should be relevant to the Court's decision.

Respectfully submitted,

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

v.

NATHALIE NORRIS *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

To assist in the recruitment and retention of qualified employees, the State of Arizona has adopted a deferred compensation plan under which participating employees direct the State to invest a portion of their salaries in tax-deferred accounts offered by private insurance companies and other financial institutions. At retirement, employees can elect to recover the income so accumulated either by receiving the total amount in a lump-sum payment or by purchasing an annuity from an insurance company selected by the State as a funding medium. Under Arizona's plan, life annuitants who have accumulated the same sums during their worklives and retire at the same age nevertheless receive different monthly benefits depending on their sex. A retired female employee receives less per month than a comparably aged, comparably situated retired male employee.

Does Title VII of the Civil Rights Act of 1964, as construed in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), prohibit the State of Arizona from adopting a voluntary deferred compensation plan that pays a smaller monthly annuity benefit to female retirees solely because of their sex?

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

This brief is filed, with the consent of all petitioners and respondents, on behalf of the American Association of University Professors ("AAUP"), the American Federation of Teachers ("AFT"), and the National Education Association ("NEA"), *amici curiae*, in support of the respondents.

INTEREST OF THE *AMICI*

The *amici curiae* are three of the nation's largest organizations of teaching professionals. Many of their members participate in employer-sponsored defined contribution annuity plans that pay smaller periodic benefits

to retired female employees than to comparably situated males.

The American Association of University Professors is a membership association of 70,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the oldest and largest association of its kind in the country. Approximately 80 percent of its members are male. The AAUP has chapters on 1,300 campuses, and 80 of its chapters engage in collective bargaining on behalf of faculty members.

The AAUP has long been committed to the elimination of sex discrimination in the higher education community. Even before this Court's decision in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the AAUP formally sought to eradicate widespread discrimination against women in the funding and management of university pension plans. Since 1974, the AAUP has repeatedly urged the Teachers Insurance and Annuity Association and the College Retirement Equities Fund ("TIAA-CREF"), the principal annuity asociations to which college and university faculty members belong, to stop the practice of using sex-based actuarial tables to derive substantially lower retirement benefits for women than men with equivalent income histories. TIAA-CREF's refusal to adopt a single actuarial table for annuitants of both sexes has generated litigation between TIAA-CREF and the AAUP raising issues similar to those presented here.[1]

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[1] The AAUP, AFT, and NEA participated as *amici curiae* in support of the petition for certiorari in Peters v. Wayne State University, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794). In addition, the AAUP is a respondent in two closely related cases: Teachers Insurance and Annuity Association v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791), and Long Island University v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3461 (U.S. Nov. 30, 1982) (No. 82-913).

The American Federation of Teachers (AFL-CIO) is an organization of teachers and faculty members employed in institutions of higher education as well as in elementary and secondary schools. Nearly 80,000 of its 560,000 members are employed in higher education, and AFT locals represent higher education faculty in formal collective bargaining relationships at about 240 institutions across the country. Operating on the national level, as well as through its affiliated locals, the AFT is committed to the establishment and preservation of sex-neutral policies in all aspects of the employment relationships of its members.

The National Education Association is the largest organization of education employees in the United States, with a current membership of approximately 1.7 million persons. A significant number of NEA members are employed in institutions of higher education, and most of these members participate in TIAA-CREF retirement plans. One of the NEA's purposes is to safeguard the constitutional and statutory rights of its members, including the right of its female members to be free from sex-based discrimination in pension and annuity plans.

The *amici curiae* are well situated to speak for pension plan participants who have a direct stake in the outcome of this case. The views of the men and women who will one day receive TIAA-CREF pension benefits may be helpful to the Court in considering and eventually resolving the issues raised in the petitioners' brief.

(These three cases are collectively referred to hereinafter as the "TIAA-CREF cases.")

The AAUP, with the American Civil Liberties Union, also participated as *amicus curiae* in *Manhart* when the Court decided that case during the 1977 Term.

SUMMARY OF ARGUMENT

We focus in this *amicus* brief on the relationship between the State of Arizona and the private insurance companies selected by Arizona to serve as funding media for the State's deferred compensation retirement plan.

Arizona describes this relationship as a distant one. The State asserts that it is "not responsible" for discriminating against female retirees. "Respondent's complaint," the State argues, "really challenges the practices of the nonparty, independent insurance carriers which uniformly use sex-based actuarial tables."[2] Arizona asserts that, because the insurance companies rather than the employer committed the conduct complained of, it lacks the discriminatory motivation purportedly required of Title VII defendants by this Court's decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and other cases.[3]

In Point I of our brief, we examine Arizona's contention that it is not responsible for discrimination practiced by what it describes as "independent" insurance companies. The respondents, however, are not complaining about the *insurers'* conduct.[4] Their grievance is that Arizona has chosen to implement an annuity plan that pays different periodic benefits to its retired employees solely on the basis of their sex. It is the employer's decision to adopt and implement that plan—not simply the

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[2] Pet. Br. 11, 13. (As used in this footnote and hereinafter, the abbreviation "Pet. Br." refers to the Brief of Petitioners filed November 24, 1982; the abbreviation "Pet. App." refers to the Appendix to the petition for certiorari; and the abbreviation "J.A." refers to the Joint Appendix filed by the parties in this Court.)

[3] Pet. Br. 23-28.

[4] There is no insurance company defendant in this case. Whether an insurer can be liable under Title VII is a disputed issue in the TIAA-CREF cases, *supra* note 1, but it is not an issue here.

insurers' use of sex-differentiated mortality tables—that discriminates against individual female retirees in violation of Title VII. To hold otherwise would be to ignore the reasoning behind the Court's decision in *Manhart* and to undermine the remedial policies Title VII was designed to promote.

Virtually every lower court considering the issue has held, on the strength of *Manhart*, that an employer violates Title VII by adopting a discriminatory plan, regardless of the extent to which third-party insurers are involved. In this case, despite Arizona's protestations to the contrary, the record shows that the State was intimately involved in the design and implementation of the deferred compensation plan. The fact that parts of the plan were delegated to insurers does not absolve the State from liability under Title VII.

Point II addresses Arizona's related argument that the complainants were obliged to prove discriminatory motivation on the employer's part. In *Burdine*, *Furnco*, and the other disparate treatment cases relied upon by Arizona, complainants had occasion to refute an employer's pretextual justification for discriminatory conduct by showing that the employer did, in fact, differentiate among employees on the basis of their race or sex and not for other asserted reasons. Here, by contrast, Arizona's deferred compensation plan (like the pension plan in *Manhart*) is explicitly a sex-based plan. It pays inferior monthly benefits to women, and the calculation according to which the benefits are derived is admittedly made on the basis of sex alone; in other words, the employer nowhere suggests that the calculation merely *appears* to be based on the beneficiary's sex but in fact is not. There is accordingly no occasion to rebut other possible or plausible reasons that might explain disparate treatment of employees in other contexts. Notions of "intent" and "pretext" borrowed from *Burdine*, *Furnco* and other cases are misplaced. To prevail, Arizona must show that

sex-based determinations for computing monthly benefits for women are not forbidden by Title VII. Our position, in turn, is that they are forbidden, exactly as this Court held in *Manhart*.

Point III responds to arguments made by several *amici curiae* concerning the applicability of the McCarran-Ferguson Act. We conclude, along with the lower courts that have decided the issue, that the McCarran-Ferguson Act does not insulate an employer from liability under Title VII.

In sum, Arizona's plan unlawfully discriminates because its classifies retirees by sex on the basis of a generalization ("women live longer than men") that is false with respect to most women and thus denies them their equal rights as individuals on account of a sex-based actuarial preference chosen by the employer. The discrimination is not alleviated simply because the employer makes use of services provided by insurance companies instead of operating the plan wholly by itself.

ARGUMENT

Introduction

There is a troubling implication to arguments advanced by Arizona when viewed in light of assertions made by insurance companies in other pension discrimination cases. In all of these cases, female employees complain that defined contribution annuity plans which pay smaller post-retirement periodic benefits to women than to comparably situated men violate Title VII of the 1964 Civil Rights Act.[5] In this case, Arizona attributes to the "non-party, independent insurance carriers" whatever liability is created by the use of sex-differentiated mortality tables. But in the TIAA-CREF cases, where insurance compa-

[5] Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

nies *are* joined as parties, those companies insist that they are immune from liability under Title VII because they are not "employers" within the statutory meaning of that term.[6] The employer blames the insurance company, while the insurance company argues that only an employer can be blameworthy under Title VII. Were both to prevail, aggrieved employees would find themselves with nobody to sue, victims with no remedy.

By each pointing an accusing finger at the other, employer and insurer bring an important question into focus. The involvement of third-party insurance companies here and in the TIAA-CREF cases distinguishes these annuity plans from the one the Court considered in *Manhart*. Does this distinction, by itself, justify a different outcome here? The answer has wide consequences since many private-sector pension plans rely to some extent on services provided by independent insurance companies. If the involvement of a private insurer, without more, becomes a legal predicate for distinguishing the second generation of pension discrimination cases from *Manhart*, then much of *Manhart* is undermined.

Manhart held that an employer violated Title VII by distinguishing between employees on the basis of a sexual generalization that, although true when applied to the members of the class as a whole, was not dependably true with respect to individual employees. Title VII, the Court said, "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class .... [T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes."[7] Without sacrificing that policy, can it be said that the State of Arizona, by using mortality tables supplied by

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[6] *See* Petition for a Writ of Certiorari 16-17 *in* Teachers Ins. & Annuity Ass'n v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791).

[7] 435 U.S. at 708, 709.

insurance companies instead of deriving its own tables, is treating individual female employees more fairly than the City of Los Angeles did in *Manhart*?

The answer is plain. In each case, it is the employer who has adopted a plan that categorizes employees by sex and treats female employees worse—significantly worse [8]—than their male counterparts solely because of their sex. From the vantage point of the aggrieved female employee contemplating the conditions of her employment, the discrimination she endures under Arizona's plan is inseparably featured in that plan, which prescribes what she can expect to receive as an incident of her employment—exactly as in *Manhart*.[9] Arizona has chosen to implement a pension plan under which female retirees receive smaller periodic benefits than comparably situated males. It is that choice that violates Title VII.

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[8] Respondent Nathalie Norris will receive $320.11 per month when she retires at age 65. A similarly situated male would receive $354.06 per month—10.6 percent more. J.A. 12.

[9] Arizona has avoided the temptation to offer a justification for the disparity in treatment between male and female retirees under its deferred compensation plan. Some of the *amici curiae*, however, have succumbed. *E.g.*, Brief of Teachers Insurance and Annuity Association and College Retirement Equities Fund as Amici Curiae in Support of Petitioners 5-6 (hereinafter referred to as the "TIAA-CREF *Amicus* Br."). These *amici* argue that the payment of smaller periodic benefits to women is justified by concepts of actuarial "[e]quity." TIAA-CREF *Amicus* Br. 5.

The principle of "actuarial equivalence," as it is more formally called by the American Academy of Actuaries in its *amicus* brief (Brief of American Academy of Actuaries as Amicus Curiae 20 (hereinafter referred to as the "A.A.A. *Amicus* Br.")), holds that periodic annuity payments may be adjusted to reflect differences in mortality rates for classes of annuitants in order to avoid subsidization of one class by another. A monthly annuity of $90 for a woman may be actuarially equivalent to a monthly payment of $100 for a man, because the discounted value of the "stream of payments" contemplated under a lifetime annuity is the same for the

I. The Employer is Liable Under Title VII for Adopting a Discriminatory Pension Plan.

Many of the post-*Manhart* cases in the lower courts involve pension plans administered in part by private insurers. These cases unanimously hold that employers who affirmatively adopt institutional pension plans for their employees subject themselves to potential liability for the discriminatory practices of third-party insurers.

In *Equal Employment Opportunity Commission v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), the government sued a college employer for adopting a TIAA-CREF pension plan paying smaller periodic benefits to female retirees than to males. The college claimed that it was not liable because TIAA-CREF negotiated its annuity contracts directly with college faculty members without involving the institutional employer. The court responded:

> Colby may quarrel with our short-hand statement that it insures its faculty with TIAA, but we quarrel even more with its contention that it is divorced altogether from the transaction . . . . Colby is more than a broker, or other intermediary, that enables the parties to enter into the arrangement . . . . [A]n educational institution's adoption of TIAA "constitutes affirmative, active participation," without which "the challenged program could not operate." [10]

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class of female annuitants and the class of male annuitants. A.A.A. *Amicus* Br. 12.

Manhart, however, squarely holds that actuarial equivalence is not a defense in a Title VII pension discrimination case, because the principle's emphasis on classes of annuitants is inconsistent with the statute's "focus on fairness to individuals . . . ." 435 U.S. at 709, 710. *Manhart* also rejects the notion that cross-subsidization of one class of employees by another class is objectionable. *Id.* at 710. The effort by some *amici curiae* to resurrect these notions is nothing less than an attempt to reargue *Manhart*.

[10] 589 F.2d at 1141, quoting from Spirt v. Teachers Ins. & Annuity Ass'n, 416 F. Supp. 1019, 1021, 1022 (S.D.N.Y. 1976),

Wayne State University advanced a variation of the same argument in *Peters*, another case involving a TIAA-CREF annuity plan. According to the university, TIAA-CREF had "unilaterally decided" to use separate mortality tables for male and female retirees, without asking the employer to endorse or ratify their use.[11] This was enough, the university argued, to make TIAA-CREF the only party that could be liable under Title VII. The trial court disagreed: "The ties between [employer] and [insurer] are too great to allow them to each deny liability on account of the actions of the other." [12]

Title VII is violated, not by an insurer's reliance on separate tables, but by an employer's *adoption* of a pension plan that classifies employees by sex to the detriment

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aff'd, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791). *Accord*, Sobel v. Yeshiva Univ., 477 F. Supp. 1161, 1166 n. 4 (S.D.N.Y. 1979).

[11] Peters v. Wayne State Univ., 476 F. Supp. 1343, 1345 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794).

[12] *Id.* at 1350.

Although the Sixth Circuit subsequently reversed the judgment of the trial court on other grounds, it affirmed and even expanded this holding:

> Wayne State emphasizes . . . that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees.

Peters v. Wayne State Univ., *supra* note 11, 691 F.2d at 238 (emphasis in the original).

The references in the petitioners' brief to the appellate court decision in *Peters* (Pet. Br. 12, 23) are somewhat misleading. Twice, the petitioners cite language from the *Peters* decision to the effect that TIAA-CREF did not operate as Wayne State's "agent"; what the petitioners fail to mention, however, is that TIAA-CREF's status under agency law was relevant, in the court's eyes, to *TIAA-CREF's* liability under Title VII, not Wayne State's.

of female members of the workforce.[13] The act of "choosing" a particular insurer, *Peters*, *supra*, 691 F.2d at 238, or "adopt[ing]" an insurer's system, *Colby College*, *supra*, 589 F.2d at 1141, or becoming "involve[d] in the overall program," *Spirt v. Teachers Insurance & Annuity Association*, 475 F. Supp. 1298, 1308-1309 n.16

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[13] It is possible that an employer who sponsors a defined benefit plan (rather than the defined contribution plans at issue here and in the TIAA-CREF cases) might take into account the different mortality rates of male and female employees in setting the amount of employer contributions to the pension pool. *See* A.A.A. *Amicus* Br., *supra* note 9, at 5. For example, one employer whose work force is 50 percent female may need to set aside a larger pension pool than another employer whose work force is only 20 percent female. In determining exactly how much money an employer must allocate to the pension pool, the employer may be permitted to take into account the different mortality rates of the class of male and the class of female employees. So long as each employee is required to contribute equally to the plan and receives comparable benefits, the requirements of Title VII are satisfied. It is not the mere use of separate mortality tables that offends the statute; it is the employer's decision to treat females differently than males because of their sex.

But even under these circumstances, the use of sex-based tables may not be actuarially required, or even actuarially sound. Actuaries are not of one mind with respect to the predictive accuracy of sex-based mortality tables or the need to use such tables. *See, e.g.*, Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 535 (1980). Most pension plans—"[t]he overwhelming majority" of them, to use the Labor Department's words—do not distinguish between men and women in the provision of retirement benefits. Dep't of Labor, Wage and Hour Div., "Amendment to Interpretive Bulletin," 43 Fed. Reg. 38029, 38030 (1978). Employers who, for legal or equitable reasons, were reluctant to sponsor plans incorporating sex-based tables have found insurers willing to provide pension coverage on a "unisex" basis. *E.g.*, "U. of Minnesota Adopts Unisex Plan for Pensions: 'Right Thing to Do,'" CHRONICLE OF HIGHER EDUCATION, Oct. 13, 1982, at 25. In short, it is incorrect to suggest that employers must rely on sex as a predictor of longevity, or cannot find insurers willing to provide benefits on a unisex basis.

(S.D.N.Y. 1979),[14] brings an employer within the reach of Title VII.[15]

By contrast, an employer who serves as nothing more than a "broker" or "intermediary," *see Colby College*, *supra*, 589 F.2d at 1141, bringing together insurers and employees who negotiate their own pension arrangements without the employer's sponsorship, cannot be said to have adopted an institutional pension plan at all, and cannot, therefore, be liable for the *unsanctioned* payment of sex-differentiated annuity benefits by an independent insurer. For example, an employer who collects information from pension plan operators and distributors the brochures to employees should not be liable for the discriminatory practices of those insurers. If the employer serves merely as a clearinghouse for employees who are responsible for making independent decisions on pension coverage, then the discriminatory practices of those insurers should not be imputed to the employer.

This, indeed, is a logical corollary of the "open market" dictum in *Manhart*.[16] The Court's reference to the "open

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[14] *Aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791).

[15] *See* Van Alstyne, *Equality for Individuals or Equality for Groups: Implications of the Supreme Court Decision in the Manhart Case*, 64 AAUP BULL. 150 (1978). Professor Van Alstyne proposes a simple decisional rule:

> What the employer cannot do directly, the employer cannot do indirectly. If the employer cannot find a third party agreeable to the employer's own duty of nondiscrimination toward its employees, it has two choices under Title VII: provide the service itself (on nondiscriminatory terms) or abandon it altogether. What an employer may *not* do, however, is to provide it in any manner (including by arrangement with a third party) which discriminates among the employer's own employees by race, sex, religion, or national origin. [*Id.* at 154; emphasis in the original.]

[16] "[I]t would [not] be unlawful for an employer to set aside equal retirement contributions for each employee and let each re-

market" is not meant to encourage an employer's proffer of pension benefits on discriminatory terms; it simply allows an employer to serve as custodian of its employees' retirement contributions, leaving employees at retirement to the vicissitudes of a possibly discriminatory market. But it is one thing to say that an employer is under no obligation to correct discriminatory practices fostered by the marketplace, and quite another to permit the employer to *import* those practices into its own plan.

General Building Contractors Ass'n v. *Pennsylvania*, —— U.S. ——, 50 U.S.L.W. 4975 (U.S. June 29, 1982) (No. 81-280), is not inconsistent with our analysis. The employer's liability in a pension discrimination case is not the kind of vicarious liability with which the Court was concerned in *General Building Contractors*, but an independent liability derived from Title VII and unrelated to concepts of *respondeat superior* or nondelegable duty. In *General Building Contractors*, employers entered into a facially neutral hiring plan operated by a labor union. Unbeknownst to the employers, and in contravention of the agreement, the union operated the plan in a manner that discriminated against black job applicants. 50 U.S.L.W. at 4976. Here, by contrast, employees challenge a facially discriminatory employment practice on disparate *treatment* grounds, and have shown that the employer knew of and condoned differential treatment for male and female retirees. Title VII makes it unlawful for an *employer* to discriminate against any individual with respect to the terms or conditions of employment, and it is the employer's conduct that forms the basis for a statutory violation. Our analysis is predicated on the language of the statute, not on common-law notions of agency.[17]

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tiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18.

[17] We should add parenthetically that, even if the Court were to adopt the *respondeat superior* approach of *General Building Contractors*, it is far from clear that the result here would be the same as in that case. Arizona exercises considerably more control over the

Pension plans are structured in many ways, each one varying to some extent in the relationship between employer and insurer.[18] All plans, however, have one thing in common: they involve the payment of "compensation" by an "employer" within the meaning of those terms in Title VII.[19] To allow the involvement of insurance com-

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actions of the insurance companies here than the employers exercised over the labor union in *General Building Contractors*.

[18] *See generally* A.A.A. *Amicus* Br., *supra* note 9, at 4-9. *See also* Pet. Br. 3-6 (description of Arizona's plan); TIAA-CREF *Amicus* Br. 3-4 (description of TIAA-CREF's plan).

The relationship between college employers and TIAA-CREF is extraordinarily close, the product of TIAA-CREF's history and the unique configuration of its national pension system. *See Colby College, supra*, 589 F.2d at 1141; *Peters, supra*, 476 F. Supp. at 1346. *See generally* Greenough, W., & King, F., BENEFIT PLANS IN AMERICAN COLLEGES 8-14, 39-49 (1969) (referred to below as "BENEFIT PLANS"). There are many reasons why the relationship between TIAA-CREF and college employers is closer than the relationship that ordinarily exists between insurer and employer. TIAA-CREF was originally conceived and organized by the Carnegie Foundation for the Advancement of Teaching, and has always maintained close ties with the teaching profession. *See* Memorandum for Respondent American Association of University Professors 3-5, *in* Teachers Ins. & Annuity Ass'n v. Spirt, *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791). Institutional employers must pass enabling resolutions establishing eligibility standards. In most instances, the college requires employees to participate in the plan, and—perhaps most importantly—matches employee contributions with contributions of its own. BENEFIT PLANS 39-49. As one lower court has held, the activities of TIAA-CREF "are so closely intertwined" with college and university employers that they are essentially one entity for Title VII purposes. Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791).

In all these respects, the TIAA-CREF plan differs from Arizona's deferred compensation plan. While we believe, for reasons stated in the text, that Arizona is not insulated from liability, we note that this is even more clearly the situation in the TIAA-CREF cases pending before the Court on petition.

[19] *See Manhart*, 435 U.S. at 712 n. 23 ("pension benefits . . . are 'compensation' under Title VII").

panies to insulate the employer from Title VII liability "would impair the effectiveness of the Act." [20]

Arizona's deferred compensation plan requires close collaboration between the state and the insurers selected to manage the plan. The court below identified several examples of employer involvement in the plan:

> [T]he adoption of the plan constitutes active participation without which the challenged program could not operate. Arizona made the selection of certain companies as funding media. It approved participation in the plan and deducted the appropriate amount from the employee's salary.[21]

It is clear, in sum, that Arizona acts as considerably more than a "broker." The state is actively involved in the funding and management of the plan. The state selected the insurance companies whose actuarial practices it now disowns. Having chosen to operate an annuity plan, the state must see to it that the plan complies with Title VII. In this case, Arizona operates a plan that classifies retirees by sex. The state must answer for its conduct, as the court below appropriately held.

II. A "Facially Discriminatory" Employment Practice, Such As the Classification of Retirees by Sex, Constitutes Intentional Discrimination Under Title VII.

Arizona also asserts that a finding of discriminatory motive is a precondition for liability under Title VII.

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[20] Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791)

Title VII is a remedial statute designed to eradicate discrimination in employment. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971). Like other remedial statutes, it must be construed liberally and in a fashion that achieves the congressional purpose for which it was enacted. *E.g.*, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

[21] 671 F.2d at 334 (citations omitted); Pet. App. A-8.

Because separate actuarial tables were maintained by the *insurers* rather than the employer, it follows, according to Arizona, that any discriminatory motivation that may have existed cannot be attributed to the employer.

Arizona's argument hinges on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and several subsequent decisions that refine the holding in *McDonnell Douglas*, notably *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). These cases, however, use the term "discriminatory motivation" in a wholly different sense than it is used by Arizona.

McDonnell Douglas and its progeny address the evidentiary problems that arise when a Title VII plaintiff who alleges that an employer has discriminated on the basis of sex or race relies only on circumstantial evidence to prove that claim, and the employer responds that *some other motivating factor* was actually responsible for the decision to treat the employee in a disparate fashion. In such cases, employer and employee dispute whether the employer actually relied on a prohibited racial or sexual characteristic. The employer maintains that some factor unrelated to the employee's sex or race—for example, the employee's decision to engage in unlawful conduct (in *McDonnell Douglas*), or the employee's lack of specialized job skills (in *Furnco*), or the employee's inability to get along with co-workers (in *Burdine*)—was the reason for treating the employee differently. The employee must then show that these purported explanations are pretexts, and that the employee is "the victim of intentional discrimination" based on the employee's sex or race. *Burdine*, 450 U.S. at 256.

In cases in which the parties disagree over the basis for the employer's action in singling out employees who are members of a single sex or single race, the *McDonnell Douglas* line of cases provides an evidentiary mechanism for resolving the disputed question. When there is no

dispute, however, there is no occasion to apply *McDonnell Douglas*. If the employer offers no pretext for his conduct—if, in other words, the employer freely acknowledges that sexual or racial generalizations were used to classify employees—then the employer's conduct is discriminatory on its face, regardless of the employer's asserted justification. The question is no longer the preliminary, merely evidentiary one addressed in *McDonnell Douglas* (how should the court resolve the dispute over the employer's true reason for treating the plaintiff differently?), but whether the employer's admitted reliance on a sexual or racial classification scheme violates Title VII.[22]

A pension plan that classifies participants by sex is, to borrow a phrase used repeatedly in *Manhart*, "discriminatory on its face."[23] There is no dispute in *Manhart* or in any of the post-*Manhart* pension cases that employers treated their female employees differently solely because of their sex. They acted intentionally, and by so doing they violated Title VII.[24] They treated the members of the female group differently by paying each one of them

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[22] If this Court intended the *McDonnell Douglas* approach to apply in pension discrimination cases, one would expect to find references to *McDonnell Douglas* and other analytically related disparate treatment cases in *Manhart*. There are, of course, no such references. With the exception of the Sixth Circuit's recent decision in *Peters*, no court has ever applied *McDonnell Douglas* in a pension discrimination case. For the reasons explained in our *amicus* brief in *Peters*, we believe that the Sixth Circuit decided that case in a manner that conflicts directly with this Court's decision in *Manhart*.

[23] 435 U.S. at 715, 716. *See also* Connecticut v. Teal, —— U.S. ——, 50 U.S.L.W. 4716, 4720 (U.S. June 21, 1982) (No. 82-2147) ("*Manhart* . . . involved facially discriminatory policies"). The court below used the same phrase to describe Arizona's plan here. 671 F.2d at 334, Pet. App. A-6 ("on their face the practices in question treat men and women differently . . .").

[24] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982)

a smaller periodic benefit than a comparably situated member of the male group would receive. The Title VII plaintiff satisfies her burden of proof by showing this and nothing more—a "simple test" indeed, as the Court in *Manhart* observed.[25]

An employer's discriminatory intent, in sum, can be proven inferentially without resorting to the evidentiary mechanisms provided by *McDonnell Douglas*, *Furnco*, or *Burdine*. Here, as in *Manhart*, the employer acknowledges that it has engaged in an employment practice that is discriminatory on its face. The employer offers no pretextual justification. Under the circumstances, Arizona's intent to discriminate is clearly established.

III. The McCarran-Ferguson Act Does Not Insulate Arizona from Liability under Title VII.

Several of the *amicus* briefs argue that the applicability of Title VII is limited by the McCarran-Ferguson Act.[26] The point was not raised by the petition, and

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(No. 82-791); Retired Public Employees' Ass'n v. California, 677 F.2d 733 (9th Cir 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. New York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 226 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds). *Contra*, Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794).

[25] 435 U.S. at 711.

[26] *E.g.*, Brief of American Council of Life Insurance as Amicus Curiae in Support of Petitioners 25-26; Amicus Curiae Brief of the National Association of Insurance Commissioners 13-22; TIAA-CREF *Amicus* Br., *supra* note 9, at 8.

the Court may see fit to disregard it for that reason alone. Rule 21.1(a). In any event, the suggestion has no merit.

Many lower courts have examined the relationship between the McCarran-Ferguson Act[27] and Title VII. All have found that Title VII is not preempted or limited by the Act in any way.[28]

Section 2 of the Act[29] provides in pertinent part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." The Act was intended to provide a limited exemption from the federal antitrust laws for insurance companies that were already subject to sub-

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[27] 15 U.S.C. § 1011 *et seq.* (1976) (referred to hereinafter as the "Act").

[28] Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1063-66 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 9, 1982) (No. 82-791); Equal Empl. Opportunity Comm'n v. Wooster Brush Co., 523 F. Supp. 1256, 1265 (N.D. Ohio 1981); Women in City Government United v. City of New York, 515 F. Supp. 295, 302-303 (S.D.N.Y. 1981); Peters v. Wayne State Univ., 476 F. Supp. 1343, 1350-51 (E.D. Mich. 1979), *rev'd on other grounds*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3427 (U.S. Nov. 10, 1982) (No. 82-794). *Cf.* Dunn v. Midwestern Indemnity Midamerican Fire & Casualty Co., 472 F. Supp. 1106, 1111-12 (S.D. Ohio 1979) (holding that Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (1976), is not preempted by the Act); Ben v. General Motors Acceptance Corp., 374 F. Supp. 1199, 1202-1203 (D. Colo. 1974) (holding that the Act does not preempt 42 U.S.C. § 1982 (1976)).

The employer in *Spirt* recently told this Court that "the Second Circuit's ruling on the application of the McCarran-Ferguson Act appears to be eminently correct and is not in conflict with any other circuit." Petition for a Writ of Certiorari 11 *in* Long Island Univ. v. Spirt, *supra* note 1.

[29] 15 U.S.C. § 1012 (1976).

stantial regulation at the state level.[30] It provides statutory insulation, however, only for companies or other entities that are engaged in the "business of insurance." As this Court recently held, the Act is construed narrowly when applied to parties "wholly outside the insurance industry."[31] That, of course, describes the State of Arizona.

Furthermore, it is clear from the language of Title VII and from illuminating legislative history concerning Title VII that that statute imposes precisely the kind of "paramount federal regulation"[32] to which Arizona would be subject even if the State were engaged in the business of insurance. Title VII contains, in Section 708, a limitation on the reach of the McCarran-Ferguson Act.[33] That Congress fully intended Title VII to apply to discriminatorily administered pension plans notwithstanding the Act is confirmed by the legislative history of the Employee Retirement Income Security Act of 1974 ("ERISA").[34] By expressly preempting state regulation

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[30] SEC v. National Securities, Inc., 393 U.S. 453, 458-59 (1969); *Spirt, supra*, 691 F.2d at 1065.

[31] Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979).

[32] SEC v. National Securities, Inc., *supra*, 393 U.S. at 459.

[33] "Nothing in [Title VII] shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State . . ., other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7 (1976). The Second Circuit has observed of this provision: "To the extent that [state] law . . . permits . . . the use, or continued use, of gender-based mortality tables in violation of Title VII, it is clearly preempted under § 2000e-7." *Spirt, supra*, 691 F.2d at 1066.

[34] 29 U.S.C. § 1001 *et seq.* (1976 & Supp. IV 1980).

While the legislative history of subsequently enacted laws is not ordinarily accorded persuasive weight, this Court has examined the history of subsequent legislation in construing Title VII. *See* Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238, 4240 (U.S. Feb. 24, 1982) (No. 78-1545).

of retirement plans,[35] Congress made it clear that the national policy against racial and sexual discrimination outweighed the importance of preserving state regulatory jurisdiction. In the debates leading to the enactment of ERISA, Senator Mondale proposed an amendment expressly outlawing sex discrimination in the provision of pension benefits. He was persuaded to withdraw his proposed amendment only after Senator Williams, author of the 1972 amendments to Title VII, assured him that Title VII already prohibited such discrimination. "In light of [Senator Williams'] views," Senator Mondale told his colleagues, "and with the understanding that nondiscrimination in pension and profit-sharing plans *is fully required* under [Title VII], I will not propose my amendment at this time." [36]

"[I]t is apparent," observed one district court judge after reviewing the legislative history of ERISA, "that Congress' concern that discrimination in employee benefits be prohibited outweighed the interest it had in the insurance industry and in the preservation of state insurance regulation." [37] The Second Circuit reached the same conclusion: "Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance.' " [38]

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[35] ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B) (1976).

[36] 119 CONG. REC. 30409-19 (1973) (emphasis added).

[37] Women in City Government United v. City of New York, 515 F. Supp. 295, 305 (S.D.N.Y. 1981).

[38] *Spirt, supra*, 691 F.2d at 1065.

CONCLUSION

The involvement of insurance companies in an employer-sponsored pension plan does not significantly distinguish this case from *Manhart*. On the strength of the Court's decision in *Manhart*, the judgment of the court below should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,
Petitioners,

—v.—

NATHALIE NORRIS, on behalf of herself and all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, WOMEN'S EQUITY ACTION LEAGUE, PENSION RIGHTS CENTER, WOMEN'S LEGAL DEFENSE FUND, WOMEN EMPLOYED, EQUAL RIGHTS ADVOCATES, INC., NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN JEWISH COMMITTEE, NEW YORK COUNTY LAWYERS' ASSOCIATION, DISPLACED HOMEMAKERS NETWORK, INC., NORTHWEST WOMEN'S LAW CENTER, NATIONAL WOMEN'S POLITICAL CAUCUS, AMERICAN JEWISH CONGRESS, NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC., COAL EMPLOYMENT PROJECT, NATIONAL COUNCIL OF JEWISH WOMEN, WOMEN'S AMERICAN ORT, FEDERALLY EMPLOYED WOMEN'S LEGAL AND EDUCATION FUND, AMERICAN VETERANS COMMITTEE, OLDER WOMEN'S LEGAL AND EDUCATION FUND, AMERICANS FOR DEMOCRATIC ACTION, NOW LEGAL DEFENSE AND EDUCATION FUND, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This brief *amici curiae* in support of Respondents* is submitted on behalf of the American Civil Liberties Union, Women's Equity Action League, Pension Rights Center, Women's Legal Defense Fund, Women Employed, Equal Rights Advocates, Inc., National Women's Law Center, American Association of University Women, American Jewish Committee, New York County Lawyers' Association, Displaced Homemakers Network, Inc., Northwest Women's Law Center, National Women's Political Caucus, American Jewish Congress, National Federation of Business and Professional Women's Clubs, Inc., Coal Employment Project, National Council of Jewish Women, Women's American ORT, Federally Employed Women's Legal and Education Fund, American Veterans Committee, Older Women's League, Americans for Democratic Action, and NOW Legal Defense and Education Fund. Each of these organizations is dedicated to the principle of equal treatment under the law, and the elimination of gender-based discrimination in the workplace.**

This case poses issues of great importance to the rights of individual women workers covered by employee retirement benefit plans, an increasingly valuable fringe benefit of employment. The eradication of overt sex discrimination in the payment of employee fringe benefits is essential if women workers are ever to achieve economic equality in the workforce. Payment of employee retirement benefits based on sex-distinct mortality tables perpetuates the second-class status of women workers by guaranteeing that, upon retirement, women will be relegated to a lower standard of living. *Manhart* forbids such a result. As properly held by the courts below, an employer such as the State of Arizona bears full responsibility under Title VII for the discriminatory provision of fringe benefits, and cannot escape liability by contracting with third parties for express discrimination against its female employees.

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* Letters from counsel for both Respondents and Petitioners consenting to the filing of this brief are being filed with the Clerk.

** Statements describing each organization are set forth in the Appendix of this brief.

STATEMENT OF THE CASE

Nathalie Norris and a class of women employed by the State of Arizona brought this Title VII action in 1978, charging that the state's deferred compensation plan unlawfully discriminated on the basis of sex by providing smaller monthly retirement annuity benefits to women than to identically situated men. The issue posed by this case is whether, consistent with Title VII, Arizona may establish as a fringe benefit a deferred compensation plan which pays differential sums to men and women, based not on individual characteristics such as medical history, weight, smoking, or alcohol consumption, but solely on the sex of the employee.

A. Background

Arizona established the challenged plan[1] approximately ten years ago as a fringe benefit to provide supplemental retirement benefits to certain state employees.[2] Arizona confronts the problem, common to government employers, of attracting

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1 For a description of the development, characteristics, and unique tax status of state government deferred compensation plans such as Arizona's, see the discussion in the legislative history of Section 131 of the Revenue Act of 1978, Public Law 95-600 in H.R. REP. NO. 95-1445, 95th Cong., 2d Sess. 50-53, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7088-7091; S. REP. NO. 95-1263, 95th Cong., 2d Sess. 63-65, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6826-6828.

2 Arizona's Deferred Compensation Plan states its purpose as follows:

> . . . [T]he purpose of [the plan] is to *attract and hold certain individuals* by permitting them to enter into agreements with the Committee which will provide for *monthly payments on retirement*, as well as death benefits in the event of death before or after retirement.

Joint Stipulated Statement of Facts (J.A. 10), Exhibit 10, p. 10; Exhibit 11, p. 10 (emphasis added).

The benefits provided by this supplemental plan do not affect the amount of benefits provided under the state's primary retirement plan, which are provided on a sex-neutral basis. *See* A.R.S. § 38-874A; Exhibit 10, p. 9, 15; Exhibit 11, p. 1; *see also* Pet. Br. at 3 n. 4.

and retaining a highly qualified senior workforce in the face of competition from more lucrative jobs in private industry. In an attempt to make government employment more attractive, Arizona and other public employers have adopted a series of fringe benefits, ranging from enhanced job security to generous retirement benefits.[3] Among the most significant of such fringe benefits for senior employees is the option to defer receipt of a portion of a state employee's present compensation. Deferred compensation plans enable employees to defer a portion of their taxable income until retirement, at which time they are, presumably, taxed at a lower bracket. The deferred compensation plan is of particular importance, therefore, in recruiting and retaining senior or highly qualified employees whose salaries place them in a relatively high tax bracket.[4]

Pursuant to IRS guidelines, which were substantially codified as Section 131 of the Revenue Act of 1978,[5] Arizona employees are permitted to defer the payment of income taxes not only on the deferred wages, but also on the interest such

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3 For example, about 85% of state and local workers are covered by pension plans, compared to about half of the private work force. Moreover, on the average, public sector plans pay higher benefits than private sector plans. *See* PRESIDENT'S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 12, 16 (February 26, 1981).

4 When, in 1972, the Internal Revenue Service issued its first favorable private letter ruling authorizing a state or local government employer to establish a nonqualified deferred compensation plan for all or a part of its workforce, Arizona promptly enacted A.R.S. §§ 38-871 through 874, providing for a voluntary deferred compensation plan.

When an unfunded, nonqualified plan is maintained by a governmental unit or a church, the plan may cover all or any part of the employer's workforce. Under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), other employers may maintain such plans only to provide benefits in excess of those permitted under qualified plans, or to provide deferred compensation for a group of employees consisting primarily of highly compensated or management employees. *See* note 1, *supra*.

5 Pub. L. 95-600, Title I, § 131(a), Nov. 6, 1978, 92 Stat. 2779, *see* 26 U.S.C. § 457.

deferred wages earn. In order to avoid the immediate recognition of income by the employee pursuant to the "constructive receipt" or "economic benefit" doctrines,[6] the deferred wages and accrued interest may not be held in a funded or secured plan and must continue to be treated as the property of the employer. Thus, the deferred wages remain at all times subject to the claims of the employer's creditors.[7] Employees are permitted, however, to suggest the appropriate investment vehicle for the deferred wages from among options provided by the employer, although legal control over the deferred wages—including the legal right to decline to accede to an employee's investment or payout preference—continues to rest with Arizona until actual receipt by the employee.[8]

When a participating employee reaches retirement, the employee may receive the accumulated amount of deferred wages and accrued interest over time in the form of a life-time annuity or periodic payments over a specified term of up to 15 years, or may elect to receive the funds in a lump sum.[9]

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6 *See* note 1, *supra*. Unfunded, nonqualified deferred compensation plans were first developed by private employers as a result of Rev. Rulings 68-99, 1968-1 C. B. 193 and 72-75, 1972-1 C. B. 127, which discussed the applicability of the constructive receipt doctrine to such deferred compensation arrangements.

7 *See* Exhibit 10, pp. 4, 7, 16, Deferred Compensation Plan, Part XIII; Exhibit 11, pp. 4, 7, 15, Plan, Part XIII.

8 *See* Exhibit 10, Deferred Compensation Plan, Part V, §§ 5.01-5.02; Exhibit 11, Plan, Part V, §§ 5.01-5.02.

9 Because the principal attraction of the deferred compensation plan is tax savings, it will generally be self-defeating to elect a lump sum payment in a single tax year (no "rollover" is permitted). Unless an employee has only a small amount accumulated, the election of a lump sum payment will force the employee to pay income taxes on the deferred income (and accrued interest) at rates at least as high (and possibly higher) than the employee would have paid in the absence of the plan. To the extent women employees are subjected to pressures to "select" the lump sum option as a means of avoiding the discriminatory annuity option, they may be deprived of the principal benefit of a plan which may well have induced them to enter or to remain in government service in the first place.

Because of the tax benefits associated with deferred compensation (and in the hope of providing a secure retirement income), most employees elect the life-time annuity option, which entitles an employee to receive a fixed monthly payment until death.[10]

When Arizona invited bids by insurance companies to act as investment vehicles for its deferred compensation plan, it made no attempt to assure that the annuity payments to Arizona retirees would be nondiscriminatory.[11] In fact, each of the group annuity contracts entered into by the state under the deferred compensation plan provides for calculation of benefits pursuant to sex-based mortality tables, resulting in a lower monthly payment to individual women than to individual men who have deferred the identical amounts of income.[12] Thus, despite the fact that women and men may defer identical amounts of their wages and despite the fact that 84 percent of women will not live longer than their male counterparts,[13] all individual women receive lower monthly annuity payments than identically situated individual men, solely because they are women.

10 As of August 18, 1978, a total of 1,675 employees were participants in the plan, including 681 women. Of the 681 participating women, 572 have tentatively elected an annuity option. As of the same date, 10 women had retired, with 4 electing a life-time annuity payout. J. A. 6.

11 The state's governing committee promulgated rules and regulations to provide "safeguards to employee participants" and guidelines for companies interested in presenting offers for selection as funding media. J. A. 6; Exhibit 1, R2-9-01. The rules outline procedures and standards for selection of funding media and provide marketing controls regulating the contacts with state employees by funding media. Exhibit 1, R2-9-06, R2-9-09, R2-9-20. At no time did the committee require funding media to provide sex-neutral benefits.

12 Each of the group annuity contracts provides that the state of Arizona is the contract holder, that sex-differentiated annuity payments under contract are made to the contract holder, and that only the contract holder (and not the employees) can amend the contract. *See* J. A. 7-8; Exhibits 3-7.

13 *See Norris* v. *Arizona Governing Committee*, 671 F.2d at 332 n. 1.

B. Proceedings Below

The district court ruled below on cross motions for summary judgment that the state's plan violated Title VII[14] under the reasoning of *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978). The district court enjoined the state from carrying out its obligations under the deferred compensation plan through the use of sex-based actuarial tables and ordered that future annuity payments to retired women employees be made equal to those for similarly situated male employees. *Norris* v. *Arizona Governing Committee*, 486 F. Supp. 645, 652 (D. Ariz. 1980).

On Arizona's appeal, the Ninth Circuit Court of Appeals affirmed. The Court of Appeals held first that the deferred compensation plan was a "privilege" of employment and a "fringe benefit," and therefore covered by Title VII, regardless of its voluntary nature. *Norris* v. *Arizona Governing Committee*, 671 F.2d 330, 333 (9th Cir. 1982). It then rejected the argument made by Arizona and *amicus* American Council of Life Insurance that the McCarran-Ferguson Act prohibits the application of Title VII to the plan,[15] since the insurance

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14 Norris and the plaintiff class additionally claimed that the Plan violated the equal protection clause of the Fourteenth Amendment. The district court rejected this claim, 486 F. Supp. at 651 (emphasis added), based upon the following analysis:

> Since the Arizona statute is gender-neutral on its face, the Court must then consider whether the classification itself, covert or overt, *if not based upon gender results nevertheless in an adverse effect* which reflects invidious gender based discrimination. . . . The Court finds that it does not.

The district court failed to consider that the group annuity contracts entered into by the state's governing committee used overt sex-based classifications. The Fourteenth Amendment ruling of the district court was not appealed, however, and is not before this Court.

15 The McCarran-Ferguson Act, Section 2(b), 59 Stat. 34, 15 U.S.C. § 1012(b), states in relevant part as follows:

> No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

companies had not been ordered to discontinue the use of sex-segregated annuity tables, no state law regulating insurance had been affected, and "[a]ll the court has done is to tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man." *Id.* at 333. The Court of Appeals rejected each of Arizona's attempts to evade the applicability of *Manhart's* reasoning to its deferred compensation plan. It also rejected as meritless Arizona's objections to the district court's award of relief, stating that the relief awarded was fully authorized by this Court's decision in *Manhart*. *Id.* at 335-336. This Court granted *certiorari* on October 12, 1982.

C. Petitioners' Contentions

Arizona advances a series of arguments to avoid responsibility for the discriminatory operation of its deferred compensation plan. First, Arizona argues that whatever the intrinsic illegality of sex-discriminatory annuity payments, it bears no legal responsibility for the discriminatory activities of the insurance companies which it has selected to invest and to disburse its employees' deferred compensation funds. Second, Arizona and its supporting *amici* argue that its sex-discriminatory plan does not violate Title VII because: (1) it is based on legitimate actuarial data indicating that women live longer than men as a group; (2) it is purely voluntary; (3) it permits women to avoid the effects of discriminatory annuity payments by opting to receive their deferred compensation in a lump sum payment; (4) it leaves women annuitants no worse off than if they had purchased private annuities in the open market; and (5) it was not intended to discriminate against women. Finally, Arizona argues that, even if its deferred compensation plan violates Title VII, it should not be required to increase the monthly payments of women annuitants to erase the unlawful discrimination.

Each of the courts below held that none of Arizona's arguments serve to validate its provision of discriminatory employee fringe benefits in the form of a deferred compensation plan which treats individual women less favorably than individual men solely because of their sex.

SUMMARY OF ARGUMENT

I.

Solely on the basis of their sex, women employed by petitioner Arizona receive smaller monthly retirement annuity payments under the state's deferred compensation plan than all similarly situated men. Arizona claims that it is not legally responsible for the differential in payments ultimately received by its female employees, because, in its view, it acts as a mere "passive conduit" transmitting employee funds to employee-selected investment vehicles. But Arizona's characterization of its role fails in three respects. First, Arizona derives substantial personnel benefits from the existence of the deferred compensation plan. Second, Arizona itself selected and contracted with insurance companies as funding media for the plan. Third, legal power over the deferred compensation funds rests with Arizona until the time of actual receipt by the employee. Thus, Arizona is considerably more than a "passive conduit" through which employee funds are invested. As an employer which adopted the plan as a valuable fringe benefit designed to attract and retain qualified employees, Arizona bears full responsibility under Title VII for the overtly discriminatory operation of its plan.

Even in the absence of such indicia of responsibility, an employer may not avoid Title VII requirements by delegating the administration of its discriminatory fringe benefit plans to third parties. If the delegatee's activity prevents a Title VII protected group from equal enjoyment of the fringe benefit, the employer must either forego offering such a benefit or devise a mechanism which permits employees to enjoy it equally.

II.

The use of sex-based mortality tables in calculating retirement benefits was rejected in *Manhart* as palpably unfair to individual women employees, and as contrary to the central

goal of Title VII, the eradication of discrimination based on race or sex from the workplace. This Court ruled in *Manhart* that Title VII forbids an employer from utilizing sex-based mortality tables to calculate unequal retirement plan contributions for similarly situated male and female employees. The instant case is its mirror image. In *Manhart*, women were required to pay more for equal retirement benefits. Here, women are required to accept diminished retirement benefits because they did not make the excess payments *Manhart* deemed unlawful.

Arizona does not attempt a frontal assault on the principle that sex-based mortality tables may not be used by an employer in calculating retirement benefits; it relies instead on purported distinctions between this case and *Manhart*, which were properly rejected below. First, Arizona relies on the voluntariness of its plan, suggesting that since no employee need participate, women may avoid the discriminatory aspects of the plan. Once fringe benefits are offered as a part of the employer's compensation package, however, under Title VII they must be made equally available to men and women, whether or not they are voluntary.

Second, Arizona maintains that the existence of a lump sum payment option cures any discrimination inherent in the annuity option. This argument ignores why employees choose to participate in the plan in the first place. Under Title VII, Arizona cannot require women to suffer self-defeating income tax penalties as the price of avoiding a discriminatory annuity schedule.

Third, Arizona contends that since women could not purchase non-discriminatory annuities on the open market, it is justified in utilizing discriminatory annuities in its deferred compensation plan. Such an argument must be rejected as merely a restatement of the discredited notion that Arizona is not responsible for the discriminatory actions of its chosen funding media in administering the plan.

Finally, the contention of Arizona and its supporting *amici* that the state did not violate Title VII because its use of discriminatory annuities was not motivated by a desire to harm

women is erroneous, and flatly inconsistent with numerous prior decisions of this Court. Where, as here, an employer explicitly treats its employees differently on the basis of sex, the critical issue under Title VII is not the existence of a culpable mental state, but the nature of the justification, if any, for the differential treatment. Arizona and its *amici* offer no justification for the explicitly differential treatment which has not already been rejected in *Manhart*.

III.

The courts below found Arizona liable for sex discrimination in violation of Title VII, and granted relief by ordering Arizona to equalize future annuity payments to female retirees. Such an order lies well within the remedial power of the court under Title VII, and is fully justified under this Court's prior decisions.

Requiring employers to provide sex-neutral employee retirement benefits will not "revolutionize the insurance and pension industries" any more than *Manhart* did. Funding requirements for insurance companies need not change. The difference in cost of providing benefits for men and women employees can be taken into account in the payout stage by requiring the employer, as the district court ordered below, to equalize benefits paid to individual employees. Or, an employer seeking to lessen the financial burden of equalizing payments to future retirees could seek an insurance company which factors such costs into sex-merged or "unisex" tables used to compute benefits. Equal payments may then be achieved without additional payments by the employer. These tables are currently available, and will become increasingly common as employers exercise their purchasing power by selecting funding media for their employee benefit plans which respond to market demands for sex-neutral payments.

ARGUMENT

I. ARIZONA IS LEGALLY RESPONSIBLE UNDER TITLE VII FOR THE DISCRIMINATORY ASPECTS OF FRINGE BENEFITS WHICH IT MAKES AVAILABLE TO STATE EMPLOYEES.

Arizona attempts to absolve itself of legal responsibility for the payment of sex-discriminatory retirement benefits by shifting responsibility to the life insurance companies which it chose as funding media for its deferred compensation plan. Under Arizona's view, it acts as a mere "passive conduit" transmitting employee funds to employee-selected investment vehicles and bears no legal responsibility for the differential in payments ultimately received by its female employees. However, as an employer which has adopted a deferred compensation plan as a valuable fringe benefit designed to attract and retain qualified employees, Arizona bears full legal responsibility for the discriminatory features of its plan.[16] Arizona's attempt to portray itself as a mere "passive conduit" breaks down on at least three levels.

First, Arizona derives substantial personnel benefits from the existence of the deferred compensation plan. The earnest lobbying efforts of state and local governments against an IRS proposed revocation of the tax-deferred status of deferred compensation plans such as Arizona's, and in favor of Section 131 of the Revenue Act of 1978 (which authorizes such de-

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16 The state's "affirmative, active participation" in adopting, developing and overseeing the plan, without which "the challenged program could not operate," clearly constitutes involvement sufficient to hold it responsible under Title VII. *E.g., Spirit* v. *TIAA-CREF,* 691 F.2d 1054 (2d Cir. 1982), *aff'g* 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979), *cert. pet. filed,* Docket No. 82-791 (Nov. 9, 1982); *EEOC* v. *Colby College,* 589 F.2d 1139, 1141 (1st Cir. 1978); *Sobel* v. *Yeshiva University,* 477 F. Supp. 1161, 1166 n.4 (S.D.N.Y. 1979); *see also Peters* v. *Wayne State University,* 691 F.2d 235, 238 (6th Cir. 1982), *cert. pet. filed,* Docket No. 82-794 (Nov. 10, 1982) (Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to discriminate against women).

ferred compensation plans), bears ample witness to the importance of deferred compensation as a fringe benefit capable of attracting highly qualified persons to government service.[17] By adopting the plan, Arizona assured itself the loyal services of employees of both sexes who might otherwise have opted for more highly paid private sector employment. Since Arizona derives valuable personnel benefits from the plan's existence, it can hardly seek to divest itself of the legal responsibility of ensuring that the plan does not discriminate in violation of Title VII.

Second, Arizona has selected the insurance companies which administer the plan and, thus, is responsible for their discriminatory practices.[18] It is conceded that Arizona exercises

17 State and local governments vigorously opposed the proposed regulations and worked with Congress to reverse the IRS proposed action on deferred compensation plans. *See* Prop. Regs. § 1.61-16, 43 Fed. Reg. 4638 (February 3, 1978). Testifying against the IRS proposed regulations, a representative of state and local governments, Bernard Hillenbrand, stated that the proposed regulations would "adversely affect the internal affairs—the employer/employee relationship—of many governments which have established deferred compensation plans." He emphasized that such plans had become a valuable tool that enables public sector employers to offer an employee benefit at no cost to them, and that replacing such plans with an equal financial benefit would be an expensive budget item for state and local governments. (Hillenbrand testified on behalf of the National Association of Counties, National League of Cities, National Conference of State Legislatures, International City Management Association, U.S. Conference of Mayors, National Governors' Association, Council of State Governments, Municipal Officers Association, and the National Public Employer Labor Relations Association.) *See* TAXATION AND FINANCE (BNA) No. 88, at G-15 (May 5, 1978). Congress, thereafter, enacted section 131 of the Revenue Act of 1978 because of its concern that the proposed IRS regulations would "seriously impact upon the employees of many states and localities." *See* S. REP. NO. 95-1263, 95th Cong., 2d Sess. 65, H.R. REP. NO. 95-1445, 95th Cong., 2d Sess. 52-53, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6828, 7090-91.

18 Whatever the funding arrangements, the state retains the ultimate responsibility for providing nondiscriminatory benefits under its employee benefit plans. Employers may, and often do, fund employee fringe benefits, such as health or disability benefits, through group insurance plans. Congress was aware, for example, that enacting the pregnancy discrimination

sole discretion over the selection of investment vehicles for its deferred compensation plan. Despite the obvious discrimination against individual women inherent in the use of sex-based mortality tables, the record reveals that Arizona did not require sex-neutral tables as a condition of insurance company participation in the plan. Indeed, the record shows that Arizona made no attempt to use its influence to attempt to obtain a sex-neutral plan. Instead, it knowingly embraced a plan under which all women employees were consigned to a lower standard of living during their retirement years.

Third, Arizona's attempt to imply that the deferred compensation funds are the property of its employees is, quite simply, incorrect. In order to escape the constructive receipt or economic benefit doctrines and to qualify for deferred compensation treatment under the Internal Revenue Code, Arizona must retain legal title and complete power of disposition over the deferred compensation funds until actual receipt by an employee. Thus, while an employee may suggest that Arizona treat her or his deferred compensation in a given way, legal

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amendment to Title VII in 1978 would increase the cost of employee disability and health insurance plans, and specifically intended that all employees—not just women—would share in the proportionate incremental cost of pregnancy coverage. *See* H.R. REP. NO. 95-948, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD NEWS 4749, 4756-58. Employee pension plans are typically funded through either a group annuity contract offered by a life insurance company, called an insured plan, or through a trust established by the employer and administered through a bank or trust company, sometimes called a trusteed or noninsured plan. *See* A. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 216-217 (1982). An employer's choice of a funding mechanism for its employee benefit plans does not alter its underlying identity as an employee benefit plan subject to Title VII's requirements. *Cf.* Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829, Sept. 2, 1974, 29 U.S.C. §§ 1002(1) (definition of employee welfare benefit plan), 1002(2) (definition of employee pension benefit plan). In enacting ERISA, which covers most private pension plans, Congress understood and intended that Title VII applied, and would continue to apply to employee pension plans. *See Legislative History of the Employment Income Security Act of 1974* at 1862, 3518-19 (1976).

power over the funds rests with Arizona. Indeed, it is uncontested that deferred compensation funds remain liable to the claims of Arizona's creditors.

Arizona, therefore, is considerably more than a "passive conduit" through which employee funds are invested. As a principal personnel beneficiary of the plan; as the sole arbiter of which investment vehicles it chooses to rely on; and as the legal owner of the funds, Arizona is responsible for the failure of the plan to conform to the non-discriminatory command of Title VII.

Of course, even in the absence of such indicia of responsibility, Arizona's attempt to avoid the strictures of Title VII by delegating the discriminatory administration of its compensation plans to third persons (who might not fall within the Title VII definition of employer[19]) cannot withstand scrutiny.[20] If, for example, an employer were to offer a form of guaranteed mortgage financing through a specified local bank to senior employees in an effort to induce them to remain in its employ, it could not avoid responsibility under Title VII by arguing that the local bank's discriminatory refusal to lend money to black or women employees was a "third party" decision which rendered the compensation scheme valid. Similarly, if an em-

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19 Unlike cases involving the TIAA-CREF retirement system for employees of educational institutions where the insurer, TIAA-CREF, has been found to be so closely intertwined with the institutions it serves that it has been held to be an "employer" under Title VII, the insurers in the instant case were not joined as parties. *See Spirt* v. *TIAA-CREF*, supra, 691 F.2d 1054, 1063 (2d Cir. 1982), *aff'g* 475 F. Supp. 1298, 1308 (S.D.N.Y. 1979); *but see Peters* v. *Wayne State University, supra*, 691 F.2d 235, 238 (6th Cir. 1982), *rev'g* 476 F. Supp. 1343, 1350 (E.D. Mich. 1979).

20 Under Title VII, an employer cannot do indirectly what it could not do directly. *See Manhart*, 435 U.S. at 718 n.33. An employer could not escape Title VII liability for discriminatory compensation practices, for example, by contracting with a third party paymaster who utilizes a race-based pay scale. *See also Hairston* v. *McLean Trucking Co.*, 62 F.R.D. 642, 662-4 (M.D.N.C. 1974), *vacated on other grounds*, 520 F.2d 226 (4th Cir. 1975) (discriminatory hiring practices).

ployer were to offer membership in an employer-selected eating club as a part of its compensation package, it could hardly defend itself against a charge of violating Title VII by arguing that the refusal of the club to admit black or women employees was a third-party decision for which the employer bore no legal responsibility. Arizona's deferred compensation plan cannot be distinguished from the "mortgage financing" or "eating club" situations. In each, an employer offers a valuable fringe benefit involving the participation of a specified third person. In each, the third person's activity prevents a Title VII protected group from equal enjoyment of the fringe benefit. In each, the employer must either discontinue the fringe benefit or devise a mechanism which permits both male and female employees to enjoy it equally. What an employer may not do is continue to offer a fringe benefit as an integral part of its compensation package when it is clear that individual members of the workforce are unable to make equal use of that benefit solely because of their race, sex, religion or national origin.

Recognizing Arizona's legal responsibility for the discriminatory practices of its designated funding media in connection with a deferred compensation plan is fully consistent with the general principle that significant legal obligations may not be avoided by delegating the function at issue to a third person. *See* Restatement (Second) Of Agency § 214. In our system, legal obligations are not the equivalent of negotiable paper, to be avoided by simple assignment. In enacting Title VII, Congress imposed upon employers the affirmative obligation of nondiscrimination in the provision of compensation, terms, conditions or privileges of employment, and thereby sought to stimulate self-corrective action on the part of the employers. *See Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975). Even passive acquiescence in explicitly discriminatory employment practices cannot relieve an employer of responsibility under Title VIII.[21] Here, Arizona is much

21 An employer (or union) is not relieved of liability under Title VII for discriminatory employment practices performed pursuant to a collective bargaining agreement, for example, even where the other party has ultimate control over the practice because of its greater power in the bargaining

more than a passive observer; it is responsible in both a practical and legal sense for a plan, designed to induce persons to remain Arizona employees, over which it exercises substantial control.

II. DIFFERENTIAL ANNUITY PAYMENTS BASED UPON SEX-BASED MORTALITY TABLES VIOLATE TITLE VII BECAUSE THEY TREAT WOMEN, NOT AS INDIVIDUALS, BUT AS MEMBERS OF A SEX-DEFINED GROUP.

A. This Case Is Governed By *Manhart*.

In *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), this Court ruled that Title VII forbids an employer from utilizing sex-based mortality tables to calculate unequal retirement plan contributions for similarly situated male and female employees. In *Manhart*, Los Angeles required individual women employees to contribute a higher proportion of their salaries to obtain equivalent retirement benefits because, using sex-based mortality tables, women as a group were deemed to live longer than men. This Court ruled that, whatever the actuarial validity of relying on sex-based mortal-

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relationship. *E.g.*, *Robinson* v. *Lorillard Corp.*, *444 F.2d 791, 799 (4th Cir. 1971), cert. dismissed*, 404 U.S. 1006 (1972) ("The rights assumed by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert."); *accord*, *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 850-51 (5th Cir. 1977), *cert. dismissed*, 434 U.S. 801 (1977); *Carey* v. *Greyhound Bus Co.*, 500 F.2d 1372 (5th Cir. 1974); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973).

This Court's recent decision in *General Building Contractors Association, Inc.* v. *Pennsylvania*, ___U.S.___, 102 S.Ct. 3141, 73 L.Ed. 2d 835 (1982), relied upon by petitioners, is not to the contrary. In that § 1981 case, the employer had no knowledge that facially-neutral agreements entered into by an employers' trade association, the employers, and the union were administered in a discriminatory manner. The Court held that the employer had not violated its duty under § 1981 to refrain from intentionally denying blacks the right to contract on the same basis as whites. In the instant case, in contrast, the employer contracted for express discrimination against female employees in violation of Title VII. *See* discussion in Part II, *infra* pp. 24-27.

ity tables in computing retirement benefits, Title VII forbids the practice. In response to Los Angeles' contention that sex-based mortality tables were permissible because they provide an accurate predictor of group behavior, this Court noted that the purpose of Title VII was to assure that individuals were to be treated for employment purposes not as members of groups which have historically been the target of discriminatory treatment, but on their individual merits. This Court recognized that even when membership in a race-defined or sex-defined group might be grossly predictive of the group's future behavior, Title VII forbids the use of such devices because they hinder the realization of the Congressional goal embodied in Title VII—the eradication of discrimination based on race or sex from the employment market.[22] If, as Los Angeles unsuccessfully argued in *Manhart* and several of Arizona's supporting *amici* suggest herein, the use of actuarially validated race and sex characteristics were permissible in allocating jobs and compensation under Title VII, we would condemn ourselves to a workforce divided on lines of race and

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22 Some of petitioner's supporting *amici* argue that race should be treated differently from sex for annuity purposes. Title VII forbids such a distinction. The remedial goals of both the race and sex discrimination provisions were strongly reaffirmed by Congress in 1972, when Congress added enforcement provisions and expanded Title VII coverage to include state and local government employees. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2, 86 Stat. 103, *see* 42 U.S.C. § 2000e(a) and (f). In explaining the necessity for the 1972 Amendments, the House Committee on Education and Labor observed that "discrimination against women continues to be widespread and is regarded by many as morally or physiologically justifiable." The Committee then specifically rejected the notion that sex discrimination is less serious than other forms of employment discrimination:

> This Committee believes that women's rights are not judicial divertissements. *Discrimination against women is no less serious than other forms of prohibited employment practices* and is to be accorded the same degree of social concern given to any type of unlawful discrimination. (emphasis added).

H.R. REP. NO. 92-238, 92d Cong., 2d Sess. (1971) [To accompany H.R. 1746], *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2141.

sex,[23] precisely the evil Title VII was intended to eliminate. If, for example, race-based actuarial tables were to confirm that members of racial minorities have a lower life expectancy than their Caucasian counterparts, would Title VII tolerate an employment practice which forced black workers to pay higher group life insurance premiums solely because they are black?[24]

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23 Actuarial "equality" by definition depends upon the classifications used to determine values. As explained in Brilmayer, Hekeler, Laycock, and Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 512 (1980):

> . . . It is circular to use the expectancies generated by a predictor to justify using that predictor. This may be illustrated by a simple example.
>
> Consider the life expectancy of a newborn black male in South Carolina. Prediction of his life expectancy may or may not take into account his sex, race, and residence. If he is classified as a nonwhite male South Carolinian, his life expectancy is 58.33 years. If he is classified simply as a resident of the United States, his life expectancy is 70.75 years. The other possibilities range in between: he may be a nonwhite male American [60.98], a male American [67.04], a nonwhite American [64.95], or a South Carolinian [67.96]. He has eight different life expectancies—and just on the basis of the three predictors introduced so far.

Thus, the argument that sex-based actuarial tables are not discriminatory because they are "true" proves far too much, since it is virtually certain that every person covered can point to characteristics which actuarially demand lower (and higher) benefits simultaneously.

24 Higher life insurance rates for blacks, once the custom, were justified by insurance companies as "dictated entirely by actuarial findings." *See* M. JAMES, THE METROPOLITAN LIFE: A STUDY IN BUSINESS GROWTH 338 (1947). *See also* Fellers and Jackson, *Non-Insured Pension Mortality: The UP-1984 Table*, PRESENTATION AT THE JOINT PROGRAM CONFERENCE OF ACTUARIES IN PUBLIC PRACTICE, SOCIETY OF ACTUARIES 3 (May 1975). Risk classifications based on race or religion are now generally rejected as contrary to public policy. Nevertheless,one commentator, whose recent article is relied upon by petitioners' supporting *amici*, argues that the additional risk of sickle cell anemia in blacks or Tay-Sachs disease in Jews, which may be reflected in higher mortality rates for those racial and religious or ethnic groups, should be accounted for by charging higher life insurance rates for blacks and Jews. *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489, 511-512 (1982).

Similarly, if religion-based actuarial data were to validate the oft-expressed intuitive belief that Catholics tend to have larger families than Jews, would Title VII tolerate an employment practice which forced Catholic workers to pay higher family health insurance premiums than Jews? In each of the above-cited examples, the use of prohibited group labels to determine individual payments would be impermissible under Title VII, first, because of the perceived unfairness to the healthy black worker with a long life expectancy and the Catholic worker with a small family; and second, because we recognize that the appalling price in racial and religious divisiveness which our society would pay for such a polarization would not begin to justify the marginal increase in cost-efficiency which might arguably flow from the use of actuarially validated racial or religious tables.

The use of sex-based mortality tables in calculating retirement benefits raises precisely analogous issues. First, calculating a woman's life expectancy for retirement purposes solely on the basis of sex, and not on her general health or her use of tobacco or alcohol, is palpably unfair to the 84 percent of individual women who do not live longer than their male counterparts. Second, and perhaps more importantly, using sex-based mortality tables to calculate retirement benefits drives a wedge between men and women by assuring that a woman who works side by side with an identically-situated male will receive smaller monthly benefits after retirement, solely because she is a woman. Just as race and religion-based tables would foment bitterness and divisiveness in the workforce, so sex-based tables perpetuate the second-class status of women workers by guaranteeing that, upon retirement, women retirees will be consigned to a lower standard of living.[25] *Manhart* correctly forbids so retrograde a step.

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25 Older or retired women workers are often *doubly* disadvantaged by discrimination. When women workers who are covered by a pension plan retire (49% of men are covered by a private pension plan on their longest job but only 21% of women), they frequently receive pension benefits based upon discriminatorily depressed wages. *See* CONGRESSIONAL RESEARCH SERVICE REPORT PREPARED FOR THE SUBCOMMITTEE

The instant case is the mirror image of *Manhart*. In *Manhart*, a woman was compelled to pay more for equal retirement benefits. In this case, women are required to accept diminished retirement benefits[26] because they did not make the

ON RETIREMENT INCOME AND EMPLOYMENT OF THE HOUSE SELECT COMMITTEE ON AGING, 96TH CONG., 1ST SESS., WOMEN AND RETIREMENT INCOME PROGRAMS: CURRENT ISSUES OF EQUITY AND ADEQUACY 11 (Comm. Pub. No. 96-190) (1979). On top of that economic disadvantage, retired women receive even lower pension benefits than similarly situated men because of the application of sex-based actuarial tables.

Women receiving pension benefits get lower dollar amounts from both public and private pensions: the median private pension amount in 1976 for men was $2,060 and for women was $1,340, while the median public pension amounts were $4,830 for men and $2,750 for women. *See* WOMEN'S STUDIES PROGRAM AND POLICY CENTER AT GEORGE WASHINGTON UNIVERSITY, OLDER WOMEN: THE ECONOMICS OF AGING 8-12 (1980).

These factors have contributed to the placement of elderly women at the very bottom of the economic ladder in this country. According to U.S. Department of Labor statistics, in 1976, women over 65 had the lowest median income of any sex or age group—$2,800. This figure was approximately one half of the median income for men in that age bracket. In 1977, the median income for women over 65 was $3,087 compared to $5,526 for men.

26 Title VII mandates equal employee retirement benefits as well as equal employee contributions. *See* EEOC's Title VII guidelines, 29 C.F.R. § 1604.9 (f), 37 Fed. Reg. 6835 (April 5, 1972), and 29 C.F.R. § 1604.9 (e); *see also*, EEOC's proposed Equal Pay Act guidelines, Proposed 29 C.F.R. §§ 1620.4 and 1620.5, 46 Fed. Reg. 43848 (September 1, 1981). Unequal provision of retirement benefits have been held to be a violation of Title VII in numerous cases decided prior to this Court's decision in *Manhart*. Plans requiring women to retire earlier than men, or blacks earlier than whites, were found unlawful under Title VII. *Peters* v. *Missouri Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) (race); *Bartmess* v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (sex); *Fillinger* v. *East Ohio Gas Co.*, 4 FEP Cases 73 (N.D. Ohio 1971) (sex). In addition, plans paying lower monthly benefits to male early-retirees have been held unlawful under Title VII. *Chastang* v. *Flynn & Emrich Co.*, 541 F.2d 1040 (4th Cir. 1976); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974); *rev'd on other grounds*, 519 F.2d 559 (2d Cir. 1975) (failure to award attorney's fees), *aff'd in part, rev'd in part on other grounds*, 427 U.S. 445 (1976) (failure to award back pay).

excess payments deemed unlawful under *Manhart*. Indeed, as between the two situations, diminished benefits pose a more compelling problem because retired women are so dependent upon periodic retirement payments for economic survival.[27] In *Manhar* , women at the peak of their earning power were shielded from discrimination in calculating their retirement benefits. The same protection must be made available to retired women who can no longer absorb the costs of discrimination by working harder.[28]

B. No Persuasive Distinction Exists Between This Case and Manhart.

Apparently recognizing the wisdom of *Manhart*, Arizona does not attempt a frontal assault on the principle that sex-based mortality tables may not be used by an employer in calculating retirement benefits. Instead, Arizona offers a series of purported distinctions between this case and *Manhart*.

First, Arizona contends that its plan is distinguishable because, unlike the mandatory plan in *Manhart*, Arizona's de-

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27 The fact that the plan at issue here is designed to benefit employees who are relatively highly compensated should not obscure the economic impact that diminished retirement benefits have on the women employees in more typical employee retirement plans designed to provide primary benefits to all covered workers. *See* note 25, *supra*.

28 Virtually every court which has considered the question has held that *Manhart's* reasoning applies with equal or greater force to the unequal payment of employee retirement benefits. *See, e.g., Spirt* v. *TIAA-CREF, supra; Retired Public Employees' Association of California* v. *California*, 677 F.2d 733, 735 (9th Cir. 1982), *cert. pet. filed*, Docket No. 82-262 (August 14, 1982); *Norris* v. *Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330, 334 (9th Cir. 1982), *cert. granted* No. 82-52 (October 12, 1982); *EEOC* v. *Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978); *Probe* v. *State Teachers Retirement System*, 27 FEP Cases 1306 (C.D. Cal. 1981); *Shaw* v. *I.A.M.*, 24 FEP Cases 995 (C.D. Cal. 1980); *see also Sobel* v. *Yeshiva University*, 477 F. Supp. 1161 (S.D.N.Y. 1979); *Hannahs* v. *New York State Teachers Retirement System*, 26 FEP Cases 527 (S.D.N.Y. 1981); *Women in City Government United* v. *City of New York*, 515 F. Supp. 295 (S.D.N.Y. 1981); *but see Peters* v. *Wayne State University, supra*, 691 F.2d at 240–41.

ferred compensation plan is voluntary. Since, argues Arizona, no employee need participate, women may avoid the discriminatory aspects of the plan by declining to defer salary. Such an argument is wholly unpersuasive because it forces Arizona's women employees to forego the enjoyment of a valuable fringe benefit—the ability to defer the payment of federal income taxes on a portion of salary—in order to avoid a discriminatory payment schedule. It is no defense to a discriminatory fringe benefit plan to argue that employees may avoid the discrimination by foregoing the benefits offered by the fringe benefit. Thus, were Arizona to offer country club membership in a specified whites-only or men-only club as a fringe benefit, it could hardly escape Title VII liability by arguing that an employee's decision to seek to join the club was purely voluntary. Once fringe benefits are offered as an integral part of an employer's compensation package, under Title VII they must be equally available to both male and female members of the workforce, whether or not they are "voluntary."[29]

Second, Arizona argues that the existence of a lump sum payment option vitiates any possible discrimination inherent in the annuity table. Because a woman may elect to receive her deferred compensation in a lump sum, argues Arizona, she may participate in the deferred compensation plan while shielding herself from any discrimination. This argument ignores, however, the reason why employees—male or female—opt to defer compensation in the first instance. Employees elect deferred compensation because they hope to receive the deferred income (and any interest accrued) at a time when they are in a lower tax bracket. Under Arizona's plan, employees are taxed on the full amount of any deferred funds received in a given tax year. An employee electing a lump sum option must, therefore, pay federal income taxes on the entire lump

29 In early-retirement option cases, for example, male employees have recovered under Title VII for receiving reduced benefits under discriminatory voluntary early retirement options when unreduced, sex-neutral benefits were available under the option of working until normal retirement age. *See Chastang* v. *Flynn & Emrich Company, supra*; *Rosen* v. *Public Service Electric & Gas Co., supra*; *Fitzpatrick* v. *Bitzer, supra*.

sum in the year of receipt. Instead of saving taxes, a lump sum recipient may well be required to pay income taxes on her deferred compensation (and accrued interest) at rates as high—or even higher—than she would have paid had her salary initially have been paid to her in full. The lump sum option, therefore, avoids discrimination only at the cost of the very tax benefits which the deferred compensation plan is designed to provide. Requiring women to suffer self-defeating income tax penalties as the price of avoiding a discriminatory annuity schedule hardly qualifies as a persuasive defense.[30]

Third, Arizona contends that since women could not purchase non-discriminatory annuities in the open-market, it is justified in utilizing discriminatory annuities as part of its deferred compensation plan. Such an argument is merely a restatement of the discredited notion that Arizona is not responsible for the discriminatory actions of its chosen funding media in administering its deferred compensation plan. *See supra* at pp. 11-16. If Arizona wishes to offer fringe benefits, Title VII requires that the plan not treat women adversely because of their sex.[31] If Arizona wishes to offer an annuity

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30 If Arizona offered membership in a specified all male eating club as a fringe benefit, it would hardly constitute a defense to a Title VII case to offer an "option" of eating free at the automat to female employees. Like the automat option, the lump sum option in the instant case does not offer equivalent benefits to women employees. Moreover, even if the lump sum option were a comparable alternative, Title VII clearly forbids providing men with two desirable options while providing women with only one. Furthermore, provision of a non-discriminatory benefit to some women employees cannot legalize discrimination against others. As this court emphasized in *Connecticut* v. *Teal*, __ U.S. __, 102 S. Ct. __, 73 L. Ed. 2d 130, 142 (1982), "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." Unlike *Teal*, there is not even a pretense of bottom line equality in this case.

31 *Amicus* Equal Employment Advisory Council (EEAC) argues in support of petitioners that the plan's group annuity payout option actually places women in an "enchanced payout position", compared to the lump sum purchase of an individual annuity on the open market, and therefore is "*a fortiori* authorized by Title VII when compared to the concededly lawful lump sum payment that is inherently less favorable to female employees."

option as part of its deferred compensation plan it must either assure its sex-neutral operation or itself equalize the discriminatory differential caused by the insurers' use of sex-based mortality tables. Even if Arizona were unable to secure sex-neutral annuities—a contingency which there is no reason to believe could be true—and were unwilling to make up the discriminatory differential, it would be required to find an alternative way of compensating senior officials which does not favor individual men over individual women in violation of Title VII.[32]

Finally, the contention of Arizona and its supporting *amici* that the state did not violate Title VII because its use of discriminatory annuities was not motivated by a desire to harm women is erroneous. First, even in a constitutional context a desire to harm a victim group is not a prerequisite of liability. Invidious discrimination against women has historically been characterized by benign motives, yet that fact has not altered its essential character or mediated its harmful effects. Accordingly, this Court has repeatedly invalidated state statutes or institutional policies treating women differently from men for benign motives related to sexual stereotyping. *E.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 150-152 (1980); *Orr* v. *Orr*, 440 U.S. 268 (1979); *see also Mississippi University for Women* v. *Hogan*, __ U.S. __, 102 S. Ct. __, 73 L.Ed. 2d 1090 (1982). Second, although the district court rejected re-

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EEAC Br. at 13. In essence, EEAC argues that employment discrimination may be excused where women receive better benefits under a group employee plan, despite the discrimination, than they could obtain on the open market. EEAC's position should be rejected as a modern day sex-based equivalent of "plantation" mentality, *i.e.*, women should be grateful for the benefits they receive and not expect equal treatment. Title VII demands that individual women be treated equally in the employment setting, and not as members of some second class group.

32 The record reveals no attempt by Arizona to seek an insurance company willing to offer sex-neutral payment schedules. There is no *a priori* reason why Arizona, with 35,000 employees and over 1,675 plan participants, could not find an insurance company willing to bid on a sex-neutral plan. Arizona's power in the market place is certainly greater than that of any individual. *See also infra* at pp. 28-29.

spondents' Fourteenth Amendment claim, concluding that the requisite "discriminatory purpose" had not been established,[33] the purposeful discrimination required to establish a Fourteenth Amendment challenge[34] is specifically demonstrated by an explicit gender-based classification. As explained in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. at 272-73, in which overtly discriminatory classifications were distinguished from the facially neutral veteran's preference policy at issue in *Feeney*:

> Certain classifications, however, in themselves supply a reason to infer antipathy. Race is a paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification . . . Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination.

Where, as here, an employer explicitly treats its employees differently on the basis of sex, the critical issue under Title VII is not the presence or absence of a culpable mental state, but the nature of the justification, if any, for the differential

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33 Petitioners reliance on the district courts holding is misplaced. The district court's constitutional analysis was based on the view that the statute authorizing the state's plan was gender-neutral. In finding no purposeful discrimination, the district court erroneously failed to consider that the state entered into contracts which provided for explicitly sex-based payment of retirement benefits. *See Reilly* v. *Robertson*, 266 Ind. 29, 360 N.E. 2d 171, *cert. denied*, 434 U.S. 825 (1977) (state retirement plan paying women lower periodic benefits than similarly situated men violates state and federal equal protection clauses). The plaintiffs did not appeal the district court's equal protection ruling, and that issue is not before this Court. *See* note 14, *supra*. In any event, this incorrect ruling can have no persuasive or binding effect on this Court's determination of the existence of discrimination under Title VII.

34 *See Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1970); *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington* v. *Davis*, 426 U.S. 229 (1976).

treatment.[35] *See Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. at 711; *Dothard* v. *Rawlinson*, 433 U.S. 321, 332-33 (1977); *see also Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). Unlike many Title VII cases, no issue exists here as to the fact of differential treatment on the basis of sex.[36] The fact that the group annuity contracts entered into

35 The insurance industry practice of computing annuity benefits by using sex-segregated mortality tables constitutes neither a Title VII "business necessity" defense, BFOQ defense, nor a "factor other than sex" defense for the employer. First, the BFOQ defense specified in Section 703 (e), 42 U.S.C. § 2000e-2(e), is available only for certain discriminatory hiring and employing practices, and by its terms is not available as justification for a discriminatory compensation practice. *See Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). Second, the business necessity defense is available only in cases challenging a neutral policy with a discriminatory impact, and was not developed as a justification for explicit race or gender lines. *Id.* Although these defenses are different, a common thread unites them. To prevail once a *prima facie* violation of Title VII has been shown, the employer must minimally establish that the challenged policy is job-related and essential to the safe and efficient operation of the employer's business. The justifications for the use of explicit sex-based classifications advanced by the state completely fail to meet these standards, and petitioners do not formally assert either such defense. Finally, although raised by supporting *amici*, the state does not rely on the "factor other than sex" defense discussed and rejected by the Court in *Manhart*. Instead, the state relies solely on the argument that it is not responsible for the discrimination.

36 Having established the employer's intent to discriminate by proving the use of a sex-based classification, the end point of the analysis used in Title VII disparate treatment cases to "sharpen the inquiry into the elusive factual question of the intentional discrimination" has been reached, and the pretext analysis need not be applied. *See Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 n. 8 (1981); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). In disparate treatment cases, a pretext analysis is not apt where the plaintiff "relies chiefly upon direct evidence of discriminatory motive." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1018 (1st Cir. 1979) (age discrimination case). *See, e.g.*, *Gerdom* v. *Continental Airlines, Inc.*, 692 F.2d 602, 608-610 (9th Cir. 1982) (en banc) (Title VII challenge to facially discriminatory flight hostess weight requirement); *Lee* v. *Russell County Bd. of Education*, 684 F.2d 769, 773-774 (11th Cir. 1982) (§ 1983 race discrimination case); *Muntin* v. *State of California Parks and Recreation Department*, 671 F.2d 360, 361-362 (9th Cir. 1982) (Title VII sex discrimination case); *see also Evans* v. *Harnet County Board of Education*, 684 F.2d 304, 307 (4th Cir. 1982) (Title VII race discrimination case).

by the state utilize sex-based classifications to compute individual employee monthly annuity benefits was never disputed, and is unmistakeably clear from the face of the contracts themselves. As discussed *supra* in Part I at pp. 11-14, the state thereby provided employees with a fringe benefit which explicitly treats employees differently solely because of their sex.[37] The only issue—an issue already decided adversely to Arizona by *Manhart*—is whether the existence of actuarially validated sex-based mortality tables could justify differential treatment. Since that justification defense has already been rejected in *Manhart*, the issue of mental state is simply not relevant to a finding of liability.

III. THE DISTRICT COURT WAS FULLY JUSTIFIED IN ORDERING ARIZONA TO EQUALIZE THE DISCRIMINATORY DIFFERENTIAL IN ANNUITY PAYMENTS TO FEMALE RETIREES.

The courts below found Arizona liable for having operated a discriminatory deferred compensation plan in violation of Title VII. Arizona challenges the remedy, which requires it to equalize future annuity payments to female retirees to eliminate the discriminatory differential. Such an order lies well within the remedial power of the court under Title VII,[38] and is fully

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37 Arizona's reliance on *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 139 (1976) and *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977) is accordingly misplaced. In *Gilbert* and *Satty*, the Court held that a disability benefits plan or sick pay plan dividing potential recipients into two groups—"pregnant women and non-pregnant persons"—did not classify on the basis of "gender as such." *But see* Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, Oct. 31, 1978, 42 U.S.C. § 2000e(k). In contrast, here the employer has provided an explicitly gender-based fringe benefit.

38 A court that finds unlawful discrimination under Title VII "[m]ay enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g). *See generally Albemarle Paper Co.* v. *Moody*, 442 U.S. 405 (1975).

justified under the reasoning of this Court's prior decisions. *Manhart, supra,* 435 U.S. at 718-723; *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976); *see also Hutto* v. *Finney,* 437 U.S. 678 (1978).

Contrary to the assertions of Arizona's supporting *amici,* a ruling by this Court upholding the requirement of equal employee retirement benefits would not "revolutionize the insurance and pension industries" or cause the insolvency of pension funds any more than *Manhart* did. Title VII does not make it unlawful "to determine the funding requirements for an establishment's benefit plan by considering the composition of the entire [work] force." *Manhart, supra,* 435 U.S. at 718 n.34. The difference in cost of providing benefits for respective classes of employees can be taken into account in the pay-out stage through factoring such costs into sex-merged or "unisex" tables used to compute benefits,[39] or by requiring employers themselves to equalize benefits paid to individual employees. Accordingly, full relief under Title VII can be achieved without requiring insurance companies or other funding media to change current funding requirements for employee group annuity plans.

In this case, because the employer funded its plan through third party independent insurance companies who were not parties to the action, the court properly ordered the employer to equalize future benefits to female retirees. The present cost burden imposed on Arizona by the court's order is minimal; as of August 1978, only four retired women had selected a lifetime annuity pay-out option. Nevertheless, Arizona, and other employers offering such plans, may avoid future adverse financial consequences by using their group purchasing power to obtain sex-neutral annuity payments for future retirees, and

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39 *See generally* Fellers and Jackson, *supra* note 24. The sex-merged or composite mortality table described therein is appropriate for valuation of pension plans covering groups having 10-30% female employees, if used without adjustment. The table can be set back or set forward for use with groups with a different male-female percentage. The authors correctly note that "use of a composite table for the actuarial valuation of pension benefits should not be considered less accurate or less scientific than the use of sex-segregated mortality tables." *Id.* at 28. *See also* note 23, *supra.*

by shifting the deferred compensation funds (to which they hold title) to funding vehicles that are prepared to offer annuities which do not discriminate on the basis of sex. In that event, those insurance companies prepared to respond to the market demands of such employers will benefit from the employers' desire to avoid the necessity of equalizing individual employee retirement benefits.

Arizona's supporting *amici* do not maintain that insurance companies are unable to respond to such market demands. Sex-merged or unisex actuarial tables are not difficult to design, and are used in many large defined benefit plans for valuation purposes and for computation of joint and survivor option benefits.[40] Unisex tables have also been constructed for use in insured defined contributions plans.[41] Adverse selection by male employees, an objection to the use of unisex tables raised by the insurance industry, would be virtually nonexistent in a deferred compensation plan such as Arizona's where the tax advantages of the group annuity option overwhelmingly outweigh any countervailing benefit of opting out with a lump sum payout.

In sum, the relief ordered in the instant case should be affirmed as fully consistent with the remedial purposes of Title VII, and with this Court's decision in *Manhart*.

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40 *See* Fellers and Jackson, *supra* note 24, at 29.

41 TIAA-CREF, for example, has constructed a merged gender or unisex mortality table for computation of benefits in defined contribution plans designed for educational institutions. As explained in *Spirt* v. *TIAA-CREF, supra,* that unisex table, approved by the EEOC, has not been implemented. Recently, the University of Minnesota replaced its TIAA-CREF retirement plan with a new plan (Group Annuity Contract No. G-1130-1) administered by two private insurance companies (Minnesota Mutual Life Insurance Company and Northwestern National Life Insurance Company) using a unisex table to calculate retirement benefits. *See U. of Minnesota Adopts Unisex Plan for Pensions: "Right Thing to Do,"* CHRONICLE OF HIGHER EDUCATION 25 (October 13, 1982).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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The *American Civil Liberties Union* (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The Women's Rights Project of the ACLU was established to help eliminate the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sex discrimination in employment, including discrimination against women in employee retirement plans.

The ACLU participated as *amicus curiae* in *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), in which this Court held that the employer practice of withholding more from women's salaries than from similarly situated men's salaries for pension plan contributions constituted unlawful sex discrimination under Title VII. ACLU attorneys represent the plaintiffs-appellees-petitioners in *Peters* v. *Wayne State University and TIAA-CREF*, 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, No. 82-794 (November 10, 1982), a Title VII challenge by female employees and retirees to the University's provision, through TIAA-CREF, of lower periodic retirement benefits to women than to similarly situated men, and have participated on behalf of *amici curiae* in *Spirt* v. *TIAA*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, No. 82-791 (November 10, 1982).

Women's Equity Action League (WEAL) is a national nonprofit membership organization dedicated to securing legal and economic rights for women, particularly within educational institutions, and to addressing the economic problems of women as they grow older. WEAL conducts research, public education, administrative and legislative advocacy on the issues of social security, private pension reform, and insurance discrimination.

The *Pension Rights Center* is a nonprofit, tax-exempt, public-interest organization established in 1976 for the purposes of educating the public about pension issues, protecting

the pension rights of workers, retirees and their families, and developing solutions to the nation's retirement income problems. The Center's goal is a retirement income system that is fair, adequate and responsive to the needs of individuals and the economy.

The *Women's Legal Defense Fund*, founded in 1971 by women attorneys in Washington, D.C., is a nonprofit, tax-exempt organization dedicated to combatting discrimination on the basis of sex, especially in the area of employment discrimination. The fund, in providing pro bono legal assistance to women, devotes a major portion of its resources to combatting sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and advocacy before federal agencies charged with enforcement of equal employment opportunity laws.

Women Employed is an organization of working women located in the City of Chicago. Its members work at all levels of employment in banks, insurance companies, stock brokerages, engineering firms, law offices, the government, and in all types of corporations. Women Employed has a two-fold purpose: 1) exposing employers' discriminatory practices and seeking appropriate remedies either through direct negotiations, or where necessary, by filing charges with government agencies; 2) monitoring those government agencies to ensure that working women's rights are protected. It has assisted individuals in filing charges covering all types of discrimination, including that in employee benefit packages.

Equal Rights Advocates, Inc., is a San Francisco based public interest legal and educational corporation specializing in the area of sex discrimination. It has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. Two major concerns of the lawyers and members of the board of ERA, Inc. are the establishment of gender-based equality in the workforce and the elimination of sex-based actuarial tables used to determine rates and coverage for insurance and pension plans. Their activities in

this regard include representation of women who challenge the use of sex-based actuarial tables to determine disability insurance rates, *Life Ins. Co. of North America* v. *Reichardt*, 591 F.2d 499 (9th Cir., 1979), as well as numerous class action cases brought under Title VII of the Civil Rights Act of 1964, e.g., *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) and *Bauman* v. *U.S. District Court*, 557 F.2d 650 (9th Cir. 1977).

The *National Women's Law Center* provides legal representation to protect and advance women's rights before federal administrative agencies and courts. The Center has placed a particular emphasis on addressing problems of sex discrimination in employment and insurance, including fringe benefit plans which differentiate on the basis of sex. The Center has participated as an *amicus curiae* in many of the cases involving sex discrimination in this Court.

The *American Association of University Women* (AAUW) is a national organization of 190,000 college educated women working for the advancement of women. Dedicated for 100 years to promoting the social and economic well being of all persons, the AAUW has affirmed its commitment to improving the economic situation of American women through support of equitable pension programs.

The *American Jewish Committee* (AJC) is a national organization which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. AJC believes that this goal can best be accomplished by helping to preserve the constitutional rights of all Americans. Specifically, AJC supports equal rights under the law for women and are committed to the elimination of all gender-based discrimination.

The *New York County Lawyers' Association*, an organization of almost 11,000 lawyers who practice in the City and State of New York, has since its founding in 1908 been an active force in the promulgation of laws ensuring civil rights, political equality, and equal justice. It admitted women to membership from its inception, and in 1972 it established a Special Committee on Women's Rights, which received permanent status last year. For over ten years, this Committee has

engaged in numerous activities designed to eliminate discrimination against women, including appearing as *amicus curiae* in litigation affecting the rights of women in federal and state courts.

The Committee on Women's Rights has been closely following the cases challenging the use of sex-based mortality tables in calculating the periodic annuity benefits available to employees under defined contribution pension plans, and believes that affirmance of the decision below is of critical importance to women.

The *Displaced Homemakers Network, Inc.*, organized in 1978, is a national nonprofit organization of displaced homemakers, displaced homemaker service providers and other supporters. The organization's purposes are to work toward economic self-sufficiency for displaced homemakers through employment, and to provide resource materials for and communication linkages among programs and individual members to help solve the special needs of a growing group of middle-aged and older women.

The *Northwest Women's Law Center* is a nonprofit public interest law organization dedicated to securing equal rights for women through law. Located in Seattle, the Law Center conducts community and continuing legal education programs throughout the Northwest on women's legal rights; offers information and referral, and advice and counseling services; and provides legal representation or assistance in selected cases that will impact the laws and legal rights of large numbers of women.

The *National Women's Political Caucus* is a nationwide, multipartisan organization with 73,000 members in over 300 state and local Caucuses, dedicated to obtaining equal representation of women in elective and appointive office and to speaking out on issues of direct concern to women. The elimination of sex-based employment and economic discrimination has been a central concern of the National Women's Political Caucus since its founding in 1971.

The *American Jewish Congress* is a national organization of American Jews established in 1917 which has pursued as one of

its most important tasks the achievement of equality for all Americans. In furtherance of this goal, it has filed numerous briefs in opposition to invidious discrimination based on sex.

The *National Federation of Business and Professional Women's Clubs, Inc.* (BPW) promotes full participation, equity and economic self-sufficiency for working women. Founded in 1919, BPW is the oldest and largest organization representing the interests of working women, with over 155,000 members in 3,700 clubs nationwide. Respondent Nathalie Norris is a member in good standing of BPW. Each year, the membership of BPW adopts a National Platform at its Convention. This year's platform includes planks on "equal treatment for women in all areas of employment" and "equal treatment of women and men, regardless of marital status in all phases of economic life, with special emphasis on the elimination of discrimination in insurance."

The *National Council of Jewish Women*, a volunteer organization of 100,000 members committed to advancing human welfare, believes that all laws, benefits, and programs must not discriminate based on sex.

The *Women's American ORT* is an American Jewish organization of 145,000 members which is concerned with gender equality in all economic spheres.

Coal Employment Project is a nonprofit corporation which has been working since 1977 to assist women break the barriers of discrimination in the coal industry. This has involved working on many issues of importance to women workers generally, including discriminatory employee group annuity plans.

Federally Employed Women's Legal and Education Fund, Inc., is a nonprofit national organization, incorporated in 1977 under the laws of the District of Columbia. It was established to meet the special problems encountered by federal government employees in eliminating unlawful employment discrimination. The Fund offers education, counseling and collateral support, including *amicus curiae* and, where appropriate, direct participation in litigation on behalf of government employees seeking to assert their rights under federal employment discrimination laws.

The *American Veterans Committee, Inc.* (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World Wars I and II and the Korean and Vietnam Conflicts. AVC, founded in 1943, has both men and women members who participate in AVC's affairs in full equality. Its members are associated, regardless of race, color, religion, sex or national origin, to promote the principles of democracy for which they fought, including the elimination of racial and gender discrimination. AVC believes that any such discrimination is detrimental to our national welfare, both at home and abroad. In pursuance of this belief, AVC has participated in many cases before this Court.

The *Older Women's League* (OWL) is a national grass-roots advocacy organization, working for changes in public policy to address the special needs of older women. Since income adequacy is one of their primary concerns, and since less than one older woman in five receives any pension benefits, OWL supports policies that will help them have access to equitable pension income.

Americans for Democratic Action (ADA), organized in 1947, is an independent political and legislative action organization which supports equal rights for women and minorities, including the right to full equality in the workplace.

The *NOW Legal Defense and Education Fund* (NOW LDEF) is a nonprofit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was established in 1970 by leaders of the National Organization for Women, a membership organization of over 200,000 men and women in more than 750 chapters throughout the United States. A major goal of the NOW LDEF is to eradicate barriers that deny women economic opportunities and economic security. In furtherance of that goal, NOW LDEF has participated in cases to eliminate discriminatory practices that deprive women and their families equal pension and insurance benefits.

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Arizona established a voluntary deferred compensation plan, funded entirely by deductions from the employee's salary. The employer, the State of Arizona, makes no contributions. The plan includes a lump sum option. In addition, an employee may elect to receive his or her deferred compensation through a number of investment media, including a life annuity provided by a private, independent insurance company. The life annuity option provides equal value to men and women. Because the monthly annuity payments are calculated by using sex-specific mortality tables, women receive smaller periodic payments than similarly situated men.

The question presented is whether this plan violates Title VII of the Civil Rights Act of 1964.

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---

BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the American Council of Life Insurance, as amicus curiae, in support of Petitioners. Consent from counsel for both sides has been filed with the Clerk of this Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 671 F.2d 330. A copy of the opinion is reproduced in the Appendix to the Petition. The opinion of the United States District Court for the District of Arizona is reported at 486 F. Supp. 645; it is set forth in the Appendix to the Petition.

JURISDICTION

The judgment below was entered on March 11, 1982. The Petition for Writ of Certiorari was granted on October 12, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides, in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a)(1).

INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") represents the interests of 555 member life insurance companies, including most of the major life insurers in the United States. Its members currently hold more than ninety-five

percent of the life insurance in force in legal reserve life insurance companies in the United States. In addition, member companies account for ninty-nine percent of the insured private pension plan business in the United States. (The Lincoln National Life Insurance Company, the private insurance company which offered the life annuity option at issue here, is a member of the Council.) Thus, the Council has a direct and immediate interest in insurance practices, in general, and in the sound administration of pension plans, in particular.

The pension industry is large and affects many individuals. At the end of 1980, 26.1 million Americans were covered by private pension plans administered by U.S. legal reserve life insurance companies. *See* American Council of Life Insurance, 1981 Pension Facts. Assets backing these plans reached $165.8 billion, an increase of 19 percent over the immediately preceding year. *Id.*

Virtually all insurance companies, including members of the Council, have historically used sex-specific actuarial tables in calculating benefits under defined contribution plans, to account for the well recognized fact that, as a class, women live longer than men. Therefore, the decision below prohibiting the use of such tables will directly affect the current and future business operations of all insurance companies. Indeed, such a judicially forced break with the past will revolutionize the insurance industry.

The Council is concerned about the continued viability of employee retirement plans. An internal study conducted by the Council estimates that a prohibition against using sex-specific actuarial tables could increase the costs of retirement plans by as much as two billion dollars per year. The Superintendent of Insurance of New York has estimated that a total of $1.9-$2.1 billion would be needed to equalize the results of using sex-specific tables in New York funded pensions plans after the date of this Court's decision in *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702, enough possibly to bankrupt the system. Lewis, *Manhart et Sequentia: A 20 Billion Dollar Cost to Local Governments?,* 7 Employee Benefits J. 8, 13 (1982).

In any aspect of insurance, accurate risk classification is essential to maintaining the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events such as death or disability which are unpredictable on an individual basis. An individual's sex, like age, provides an objective statistical basis for accurately assessing various risks presented by that individual. As a result of several lower court decisions, including the decision below, the insurance industry's traditional and historically-accepted practice of using sex-specific mortality tables has been cast into doubt. Because of its concern that employee retirement plans continue to be administered on a sound financial basis, the Council has a direct and immediate interest in the question presented.

STATEMENT

The Arizona Deferred Compensation Plan ("Plan") (Ariz. Rev. Stat. § § 38-871 *et seq.*) is a voluntary savings and investment plan established by the Arizona legislature to provide the approximately 35,000 state employees with an option to defer compensation and taxation on that income.[1] *Norris v. Arizona Governing Committee*, 486 F. Supp. 645, 648 (D. Ariz. 1980). The Plan is administered by the Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans ("Governing Committee"), which is authorized by statute to contract with private, independent institutions for the purpose of establishing tax deferred compensation and annuity programs. *Id.* at 647. The Plan is offered strictly on a voluntary basis to all state employees and is funded entirely by employee contributions. *Id.* at 648.

Under the Plan, employees may, if they choose, have sums deducted from their pay and contributed to the Plan. During the "accumulation" phase of the Plan, employees are free to direct that their contributions be invested in a wide variety of

[1] The Arizona Deferred Compensation Plan is not a state operated retirement plan. The state retirement plan (Ariz. Rev. Stat. §§ 38-741 to-781.36, as amended) is entirely separate and provides for equal contributions and equal benefits.

funding media approved by the Governing Committee, including savings accounts, mutual funds, life insurance, or annuities. During the "pay-out" phase, the employee can elect to receive his or her deferred compensation in a variety of ways, e.g., (1) a lump sum payment, (2) a specific amount each month for a fixed number of months, or (3) a life annuity.

Respondent, Nathalie Norris, an employee of the State of Arizona, chose to participate in the Plan and to have her contributions invested in a life annuity to be provided by Lincoln National Life Insurance Co., one of the private, independent insurance companies designated by the Governing Committee. Although respondent made the preliminary choice of a life annuity, when she becomes eligible to receive her deferred income, she will have the option of receiving her accumulated compensation and earnings in a variety of ways, including (1) a lump sum, (2) a specific sum for a fixed number of months, or (3) a life annuity.

All insurance companies participating in the Plan, including Lincoln National, follow the long-established industry practice and use sex-specific mortality tables in calculating the periodic payments under a life annuity. Thus, because a woman has a statistical probability of living longer than a man, the annuity contracts provide that a woman will receive smaller monthly payments than a similarly situated man. The actuarial values of the annuity contracts are identical for men and women, and the average woman will receive more dollars than the average man because of the interest accruing to the woman over a longer period.

Respondent, after making her investment choice (a life annuity provided by Lincoln National), but before becoming eligible to receive her deferred compensation (at which time she will have the payment options described above), filed a class action in the United States District Court for the District of Arizona on behalf of herself and all female employees who have chosen, or will choose, to enroll in the Plan. Respondent contended that, because the private insurance companies designated by the Governing Committee use sex-specific mortality tables, the State of Arizona, the Governing Committee, and the

Committee's individual members violated Title VII and the equal protection clause of the Fourteenth Amendment.

Proceedings Below

The parties filed cross motions for summary judgment based upon stipulated facts. The district court found that, although the facts presented were different from those in *Manhart*, the broad reasoning of that decision required the same result, i.e., a finding of discrimination proscribed by Title VII.

The court concluded that the "open market" exception enunciated in *Manhart* was not applicable; the employees that chose to participate in the Plan were required to "select an option offered by one of the funding media approved by the State." 486 F. Supp. at 650. According to the court, the fact that employees could choose nondiscriminatory options, e.g., a lump sum distribution or a fixed annuity, had "no bearing on the lawfulness of the plan." *Id.* The court concluded: "the Deferred Compensation Plan of the State of Arizona, which provides or permits smaller monthly annuity payments to a female employee than to a male employee contributing the same amount, is discriminatory and in violation of Title VII of the 1964 Civil Rights Act." *Id.* at 652.

With respect to the equal protection claim, however, the court found that because petitioners did not have the intent to discriminate, no constitutional violation had been established. "From the facts agreed upon, it . . . [was] clear that [the challenged] classification was not made by the defendants but rather . . . [was] the result[ ] of the insurers' judgment." 486 F. Supp. at 651.

After certifying the suit as a class action, the court permanently enjoined petitioners from carrying out their obligations under the Plan through the use of sex-specific mortality tables, and ordered that the State of Arizona ensure that monthly annuity payments to female retirees be equal to payments to similarly situated males.

The court of appeals affirmed in a two to one decision, District Judge Nielson dissenting. Rejecting the careful limitations this Court placed on its holding in *Manhart* in favor of an expansive application of its reasoning, the Ninth Circuit refused to distinguish the Arizona Plan. In *Manhart*, which involved an employer-operated plan, this Court carefully noted that "[n]o private insurance company is involved in the administration or payment of benefits," 435 U.S. at 705, and that "Title VII . . . primarily govern[s] relations between employees and their employers, not between employees and third parties." 435 U.S. at 718 n.33. Referring to a footnote in *Manhart* which stated that Title VII applies to "any agent" of a covered employer and that an employer could not avoid responsibility by delegating discriminatory programs to a corporate shell, 435 U.S. at 718 n.33, the court of appeals asserted that, because the State had selected the companies which offered the discriminatory plans, *Manhart* was controlling. 671 F.2d at 334.

The court of appeals also rejected the applicability of *Manhart's* "open market" exception. In *Manhart*, this Court had stated: "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18 (footnote omitted). Although it recognized that the lump sum option in the Arizona Plan could not be considered discriminatory, the court of appeals found that, because Arizona had done more than offer nondiscriminatory options, it could not take refuge in the "open market" exception. And, even though the Arizona Plan simply reflected the limits in the marketplace, the defendants had run afoul of Title VII by "affirmatively offer[ing] a plan . . . which discriminated against women." 671 F.2d at 335.

The court of appeals rejected the argument that the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.*) prohibited the application of Title VII. Because no insurance company was a party to the suit, the court concluded that "the district court has not interfered with the business of insurance." 671 F.2d at 333.

The court disposed of defendants' contention that Title VII required an intent to discriminate in a disparate treatment case by reading *Manhart* as not requiring an affirmative showing of intent. "Nowhere [in *Manhart*] was the need to prove intent discussed." 671 F.2d at 333. Moreover, according to the court, "because on their face the practices in question treat men and women differently, Norris . . . [was] not [required to] prove Arizona's animus in adopting the plan." *Id.* at 334.

In his dissent, Judge Nielson concluded "that Arizona's voluntary Deferred Compensation Plan falls clearly within the *Manhart* open market exception." 671 F.2d at 336.

SUMMARY OF ARGUMENT

It is not disputed in this case that women, as a class, live longer than men. Sex-specific mortality tables recognize the fact that a person's sex has a demonstrable statistical relationship to longevity. The use of such tables enables an insurance company to make a more accurate assessment of an individual's life expectancy than would otherwise be possible. The tables also allow an insurance company to provide annuity plans of equal value for persons of each sex. Because an individual woman has a greater life expectancy than a similarly situated man, an annuity plan of identical actuarial value will provide smaller periodic payments to a woman than to a man.

The size of the periodic payment is not, however, the proper measure of whether an annuitant has been treated fairly. The product purchased by an annuitant is the *promise* to pay the specified amounts *if* the annuitant survives to collect. On the date of purchase, the *present value* of a policy purchased by a woman will be *equal* to the value of a policy purchased by a similarly situated man. There is, therefore, equality of treatment consistent with Title VII.

As the decision of the Sixth Circuit in *Peters* shows, this Court's decision in *Manhart* is not controlling when an annuity plan operated by a third-party insurer provides benefits of

equal value for equal contributions. *Manhart* involved an employer-operated plan requiring women to make larger contributions than men. The Arizona Deferred Compensation Plan is not employer-operated; independent insurance companies manage the funds and calculate the benefits. The employer makes no contributions and there is no requirement that male and female participants make unequal contributions. And, because the Arizona Plan provides men and women with benefits of equal value for equal contributions, there is equality of treatment consistent with Title VII.

Although explicit sex classifications are generally invalid, Title VII does not set forth a per se rule of illegality. Although there are no exceptions to the statutory rule against racial classifications, distinctions between the sexes can be drawn when there are strong efficiency interests at stake or when there is a broadly shared social norm that permits differences in treatment. Here, because there is a demonstrable statistical relationship between a person's sex and longevity, there are strong justifications for such a classification. Alternative criteria are not easily available, and the recognition that women live longer than men is not based on an archaic stereotype about the appropriate role of women in society. Use of the long recognized factual relationship between sex and life expectancy does not result in discrimination on the basis of sex proscribed by Title VII.

A prohibition on the use of sex-specific mortality tables would have a number of adverse consequences. The failure to consider a woman's longer life expectancy would result in her receiving greater value than a similarly situated man. There is a risk that the increased costs associated with providing equal annuity payments to women might provide employers with an incentive to discriminate against women. If a pension plan does not take account of lower male life expectancy, men will have an incentive to opt out in order to obtain better benefits from an insurance company which does use sex-specific mortality tables. A "unisex" plan would be inherently unstable and subject to adverse selection.

The Arizona Plan satisfies *Manhart's* "open market" exception. The Plan is entirely voluntary and provides concededly nondiscriminatory benefits which enable participants to purchase the largest benefit available on the open market. Moreover, the Plan simply makes available a range of options which exist in the marketplace. As the district court found, petitioners exhibited no intent to discriminate; the challenged classification was the result of the insurers' judgment. And, if life annuities were to be offered they would have to be provided by an insurance company which uses sex-specific mortality tables. The Council is not aware of any private insurance company which offers an annuity plan which does not calculate benefits according to sex-specific mortality tables. The most likely consequence of prohibiting the use of such tables will be to eliminate life annuities as a deferred compensation option.

ARGUMENT

I. There is Equality of Treatment Consistent with Title VII When a Voluntary Deferred Compensation Plan Provides Benefits of Equal Value for Equal Contributions.

A. The Use of Sex-Specific Mortality Tables Allows an Insurance Company to Provide Men and Women with Annuity Plans of Equal Value for Equal Contributions.

Insurance exists for the purpose of risk-sharing. Certain events, such as death, disability, or fire, are not predictable with certainty. If individuals could predict these events with precision, they could plan accordingly, though they might not be able to provide sufficient funds to cover the event. But since, for example, the date of a person's death is not predictable in any absolute sense, people are willing to pay a price to transfer the risk to another. When an insurance policy is purchased, the risk is assumed by the insurer, who pays in accordance with the outcome of the risk.

The insurer then must undertake—or "underwrite"—the burden of assessing the probability that the event insured against will occur, within specific times. Accordingly, accurate risk assessment is essential to maintaining the financial solvency

of a finite fund which is subject to partial liquidation on the occurrence of events which are not predictable in any absolute sense on an individual basis.

In assessing the probability that a hazard depending on life contingencies will occur, the insurer will necessarily examine the experience of a large number of individuals who, because of certain relevant characteristics, present similar risks. The selection of the individual characteristics which will be considered is not arbitrary. An insurer will only decide to consider characteristics when the available data and the insurer's experience establish that a characteristic has a demonstrable statistical relationship to the risk in question. This is the essence of the art of underwriting.

An insurer will not, however, take into account every individual characteristic which has *any* relationship to the risk in question. The relationship between the characteristic and the risk must be stable and predictable. In addition, the predictive value gained by considering the characteristic must outweigh the costs of assessing whether the characteristic does in fact exist.

In dealing with annuities, an insurance company, if it is to remain solvent, must have some way of estimating the number of periodic payments it expects to make to an individual. The experience of insurance companies and the available actuarial data show that the two most stable, significant, and objectively measurable factors in predicting longevity are the age and sex of the annuitant.[2] Consideration of these two factors enables an

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[2] In *Peters v. Wayne State University*, 476 F. Supp. 1343, 1345 n.2 (E.D. Mich. 1979), the plaintiffs contended that other life expectancy predictors, such as health, weight, smoking, etc., could be used in computing annuity rates. However, the court found that "[t]he evidence . . . demonstrated that only the immutable factors of age and sex could be used." 476 F. Supp. at 1345 n.2.

Insurers do, of course, utilize these other factors in assessing the risk of individual *life insurance* applicants, and "select risk" policies for non-smokers, non-drinkers, etc., are commonplace in the insurance market. Even in the annuity market, where these other factors have an opposite effect on insurer liability (i.e., the good health risk would be expected to live longer

(footnote continues)

insurance company to assess accurately and efficiently the risks that that individual presents.

Sex-specific mortality tables enable an insurance company to make a more accurate assessment of an individual's life expectancy than it otherwise would be able to make.[3] The use of such tables allows an insurance company to provide annuity

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(footnote continued)

than average, and increase the annuity risk) insurers have in recent years marketed annuities to persons with severe health problems on a "substandard", or reduced rate, basis. These are frequently utilized in structured settlement cases involving personal injury and workers' compensation claims. However, in the broad market for individual annuities it would not be economical to establish multiple rating classes for annuities in view of the paucity of interest among unhealthy individuals. For example, the person in poor health can assure an adequate return by taking an annuity with payments guaranteed for a stated number of years.

[3] The suggestion is sometimes made that the insurance industry's decision to use mortality tables which group individuals according to their sex is arbitrary, random, or biased. The suggestion that the use of sex-specific mortality tables is done with the intent to disadvantage women is, however, simply incorrect. Insurance companies use sex-specific mortality tables because they make it possible to make a much more accurate assessment of an individual's life expectancy than would otherwise be possible.

Both current industry practice and historical experience attest to the fact that sex-specific mortality tables are used because of actuarial considerations. For example, the use of sex-specific mortality tables results in women paying *smaller* life insurance premiums than similarly situated men. And, life insurance premiums account for a much larger percentage of the insurance business than do annuity considerations. In 1981, life insurance premiums paid to American life insurance companies were $47.4 billion, compared with $28.6 billion for annuity considerations. American Council of Life Insurance, 1982 Life Insurance Fact Book. The historical record also dispels any suggestion that the use of sex-specific mortality tables is a means to disadvantage women. Over the last 200 years,

> life insurance premiums for women rose and fell in accord with the most recent study comparing male and female mortality. The availability and cost of disability insurance underwent similar variations. However, despite the early uncertainty surrounding this classification, there can be little question anymore that classifying on the basis of the sex of the insured is statistically justified.

Bailey, Hutchison, and Narber, *The Regulatory Challenge To Life Insurance Classification*, 25 Drake L. Rev. 779, 786 (1976)(footnotes omitted). Of course, in this case respondent did not challenge the accuracy of sex-specific mortality tables.

plans of equal actuarial value. And, since an individual woman has a statistical probability of living longer than a similarly situated man, an annuity plan of identical actuarial value will promise smaller periodic payments to a woman than to a man.[4]

In determining whether men and women annuitants have been treated equally, however, the *periodic* payments that will ultimately be received are irrelevant. In deciding whether there has been unfair discrimination, it is necessary to focus on the product purchased by the insured. The proper focus is on the contractual rights received in exchange for the price of the annuity.[5] The purchaser of a policy does not buy the amounts that will be paid upon occurrence of the event insured against; rather, the product purchased is "the *promise* that *if* the event

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[4] Some have argued that a woman's longer life expectancy should not be considered because in a group of retirees of the same age with the same number of men and women it would be possible to match 84% of the men and women as to year of death. According to this "overlap" argument, it is unfair to treat all women differently because only a minority, i.e., 16%, live longer. The numerous critiques of this theory have shown its fallacies. *See, e.g.*, Benston, *supra*, at 515 n.72 (discussing the theory and citing the relevant literature); Kimball, *supra*, at 120-23. Although there are a number of reasons for rejecting the "overlap" theory, perhaps the most compelling is that the theory does not focus on the reason insurance companies use mortality tables, *viz.*, to obtain an accurate prediction of an individual's life expectancy. As Professor Benston states: "[A]n overlap of two distributions is irrelevant for assessing probabilities . . . ." Benston, *supra*, at 515 n.72. The same "overlap" argument can be made with respect to age; yet, no one seriously argues that age is not a relevant factor in predicting life expectancy. *See* Myers, *Forum: Pension Benefits and Sex*, 9 Civ. Rts. Dig. 45, 46 (1977).

[5] Thus, an insured who dies after receiving only one monthly payment has received the same value as an insured who lives for twenty years. As Justice Holmes stated in considering whether, for estate tax purposes, a life estate was to be valued on the basis of life expectancy on the date of the decedent's death or on the basis of the life tenant's actual longevity when the life tenant died before the estate tax was calculated:

> [T]he value of the thing to be taxed must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. . . . Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true.

Ithaca Trust Co. v. United States, 279 U.S. 151, 155 (citation omitted).

occurs, the designated amount will be paid." Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 497 (1982) (emphasis in original); *see* Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Found. Research J. 83, 99-102. The value of the promise received in exchange for the price of the annuity policy "is measured by the present value of the amounts promised multiplied by the probability that the event insured against will occur. . . ." Benston, 49 U. Chi. L. Rev. at 503. At retirement, the present value of an annuity purchased by a woman is *identical* to the value of an annuity purchased by a similarly situated man.[6] Since the annuity plans offered to men and women are of identical value, there is equality of treatment consistent with Title VII.

B. As the Decision of the Sixth Circuit in *Peters v. Wayne State University* Shows, *Manhart* is Inapplicable to an Annuity Plan Operated by a Third-Party Insurer Which Provides Benefits of Equal Value for Equal Contributions.

Recently, the Sixth Circuit, in *Peters v. Wayne State University*, Nos. 79-1658,—1670,—1671 (decided Oct. 14,

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[6] Although at retirement the present values are identical, a woman annuitant who lives to the predicted age will receive greater total payments than a man who lives to the predicted age. Suppose a man and a woman both retire at age 65 with equal accumulations. Let X = the monthly income payments for the man, and Y = the monthly income payments for the woman. At the annuity starting date, the present values, including interest and mortality, of the periodic payments expected to be made during the lifetime of both the man and the woman are equal and are also equal to the accumulation. Let A = the number of months which is the average expected remaining lifetime (life expectancy) of the man, and B = the number of months which is the average expected remaining lifetime (life expectancy) of the woman. The "aggregate sum" of payments is equal to the total dollar amount, without interest, of periodic payments to be made assuming that each annuitant dies at the end of the average expected remaining lifetime. This is equal to AX for the man and BY for the woman. As shown by the table set forth in the Appendix to this brief, BY, the aggregate sum received by the woman, is in fact significantly greater than AX, the aggregate sum received by the man.

This could, indeed, be argued to be discrimination in favor of women, but that, of course, is not the case.

1982), *petition for cert. filed* (No. 82-794), analyzed a Title VII claim similar to the allegation presented by the respondent in this case. Wayne State offered its faculty and certain employees a pension plan administered by Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF). Under the TIAA-CREF plan, which uses sex-specific mortality tables to calculate benefits, female annuitants receive smaller monthly payments than similarly situated males. The district court found that Wayne State, TIAA, and CREF had all violated Title VII. *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979). In a unanimous opinion, the court of appeals reversed.

The Sixth Circuit rejected the argument that this Court's holding in *Manhart* was dispositive. The court correctly noted that *Manhart* held only that an employer-operated pension fund requiring women to make *larger* contributions than men violated Title VII. As the Sixth Circuit observed, under the pension plan involved in *Manhart*, women received smaller take home pay than similarly situated men. In contrast, under the annuity plan offered at Wayne State, men and women made equal contributions. Also, unlike the situation in *Manhart*, the pension plan was not employer-operated; an independent insurer managed the fund and calculated the benefits.

Although it recognized that female annuitants receive smaller periodic payments when sex-specific mortality tables are used, the Sixth Circuit focused on the fact that "the present actuarial values of women's and men's benefits are identical," *Peters*, slip op. at 3, and concluded that "[c]areful analysis of Wayne State's actions reveals neither disparate treatment nor disparate impact." *Id.* at 5. The plaintiffs had not established that the recognition that every individual woman has the same statistical probability of outliving a man of the same age was "a pretext to mask . . . [an] intention to disadvantage and harm female annuitants." *Id.* at 7. Moreover, there was no adverse effect on women because "[t]he retirement plan [was] not worth more to men than to women." *Id.* at 9.

The Sixth Circuit found that the use of sex-specific mortality tables to calculate annuity benefits did not constitute discrimination *against* women. The court concluded:

> Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the same probability of living to the predicted statistical age.
>
> * * *
>
> We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

Peters, slip op. at 9-10 (emphasis omitted).

The court in *Peters* recognized that not every difference in treatment amounts to discrimination, as defined by Title VII. The legality of the challenged practices can be determined only after a careful assessment of the reasons behind them and their overall operation, and not by focusing exclusively on a single payment among many.

The Sixth Circuit's decision in *Peters* shows that *Manhart* is inapplicable to the specific facts presented by the instant case. Like the Wayne State plan at issue in *Peters*, the Arizona Plan is not employer-operated; an independent insurance company manages the funds and calculates the benefits. In addition, unlike the situation in *Manhart*, the employer makes no contributions under the Arizona Plan. In fact, the employer is prohibited from so doing by state law. Also, unlike *Manhart*, the retirement plans in *Peters* and in the instant case did not

require male and female participants to pay unequal contributions. And, because the plans provide men and women with benefits of equal value for equal contributions, there is equality of treatment consistent with Title VII.

C. There is No Discrimination in Violation of Title VII When an Insurer Considers the Differences in Life Expectancy between the Sexes in Calculating Annuity Payments.

Respondent's Title VII allegation appears to be based on the simplistic notion that it is impermissible to resort to a characteristic mentioned by Title VII, even if that characteristic has a demonstrable statistical relationship to longevity. The argument for what appears to be a per se rule is, however, inconsistent with both the statutory framework and the case law. Although Title VII sets forth a rule of per se illegality for explicit racial distinctions, no such rule pertains in the area of sex discrimination. It appears "that although explicit sex classifications are presumptively invalid, they can be justified where there are strong efficiency interests at stake or where there is a broadly shared social norm that requires that men and women be treated differently." Freed and Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment,* 1981 Am. Bar Found. Research J. 585, 589.

Title VII recognizes that, in certain circumstances, it is permissible to consider sex in making employment-related decisions. For example, Section 703(e) allows an employer to base a hiring decision on the sex of an applicant "where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). In addition, employers have been allowed to consider the sex of an employee because of "privacy" concerns, *e.g., Fesel v. Masonic Home,* 447 F. Supp. 1346 (D. Del. 1978), *aff'd,* 591 F.2d 1334 (3d Cir. 1979), or because of differences in dress or grooming standards. *E.g., Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084 (5th Cir. 1975) (en banc), *vacating* 482 F.2d 535 (5th Cir. 1973). Both Congress and the courts have recognized that

in limited situations, it is permissible to consider an employee's sex, when it would not be permissible to consider an employee's race.

The courts have suggested that employers may take into account differences between men and women when there is a strong correlation between sex and the characteristic in question. *See, e.g., Dothard v. Rawlinson,* 433 U.S. 321, 332-37; *Phillips v. Martin Marietta Corp.,* 400 U.S. 542 (per curiam). This exception is certainly not very broad.[7] For example, it would undoubtedly be impermissible to base an employment-related decision on a characteristic related to an employee's sex if an alternative criterion was easily available. Also, it would undoubtedly be impermissible to base an employment-related decision on a characteristic related to sex if to do so served to reinforce a stereotype as to the appropriate role of women in society.

In this context, taking into consideration a characteristic, i.e., life expectancy, which is related to sex does not run afoul of any of the limiting principles outlined above. Clearly, alternative criteria are not easily available.[8] "As . . . the voluminous

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[7] There is, of course, a danger that the claim that an employer is simply taking into account allegedly legitimate differences between the sexes may be a pretext for invidious discrimination. An employer might be indulging a taste for discrimination. Therefore, it would be necessary to require a strong empirical showing that there was indeed a demonstrable statistical relationship between sex and the characteristic in question.

Here, however, the stipulation entered into by the parties accepted the accuracy of sex-specific mortality tables. Some commentators have argued that "sex turns out to be a spurious, weak, and unstable predictor of mortality." Brilmayer, Hekeler, Laycock and Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis,* 47 U. Chi. L. Rev. 505, 559 (1980). This conclusion has been subject to severe criticism. *See* Benston, *supra,* at 525-29. In any event, the demographic conclusions of the Brilmayer article are irrelevant in this case, since the parties have stipulated to the contrary.

[8] In contrast, the use of sex to predict weight-lifting ability would be impermissible in part because the employer has the option of administering an individual weight-lifting test which is highly predictive and cheap to administer. *See* Freed and Polsby, *supra,* at 628. An insurer who ignored a woman's longer life expectancy, however, "would incur substantial costs if it

(footnote continues)

actuarial science literature show[s], knowledge of an annuitant's gender permits a much more accurate assessment of the risk of that person's death than is provided by models that omit this variable." Benston, *supra*, at 524. And, to recognize that there is a demonstrable statistical relationship between sex and life expectancy does not perpetuate archaic and overbroad stereotypes about the appropriate role of women in society. Therefore, because "there is considerable evidence that a person's gender is a valid and useful predictor of that person's life expectancy," Benston, *supra*, at 542, i.e., there are strong efficiency justifications, and because alternative criteria are not easily available, making use of the relationship between sex and life expectancy does not result in discrimination on the basis of sex proscribed by Title VII.

D. A Prohibition on the Use of Sex-Specific Mortality Tables Would Result in Inequitable Treatment of Individuals and Serious Market Disruptions.

Using sex-specific mortality tables in calculating annuity payments enables insurers to give men and women equal value for equal contributions. In addition, the use of such tables enables insurers to operate retirement plans on a financially sound basis. In contrast, prohibiting the use of a characteristic which has a demonstrable statistical relationship to longevity will result in inequitable treatment of individuals and serious market disruptions. *See* Benston, *supra*, at 532-42.

First, the failure to take into account longer life expectancy will provide greater value to women. If a man and a woman acquire the right to receive equal monthly payments for life, there is no doubt that the *value* of the woman's *right* to the

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(footnote continued)

awaited an individualized determination of lifespan in the form of the insured person's death." *Id.* at 629. Because insurance requires that some estimates of future events be made, so that a sufficient fund can be established, this approach is not possible. "[O]nce the special characteristics of insurance are recognized for what they are, it is difficult to understand how it could be seriously maintained that individualized determinations of longevity are functionally similar to individualized determinations of weight-lifting ability. The logic of that argument, indeed, would apply to insurance in general." *Id.*

annuity is greater than the value of what a man of the same age would receive.[9]

Second, since there would be increased costs associated with providing equal annuity payments to women, there is a risk that employers might have an incentive to discriminate against women — a result directly in conflict with the Civil Rights Act.[10]

Third, men who either are participants or are eligible to participate in a pension plan which provides annuities on a basis which does not reflect the differences in life expectancy between men and women will, if they can, opt out in order to obtain better benefits from an insurance company which prices products using sex-specific mortality tables.[11]

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[9] This fact is illustrated by the tax laws which utilize sex-specific mortality tables in computing the "fair market value" of annuities. *See* I.R.C. §§ 170, 403, 691; Treas. Reg. §§ 172.9, 20.2031-10, 25.2512-9. Under the Arizona Plan the insurer is obligated to repay the accumulated value of each employee's account. If the employer currently pays an additional amount into a female's account to equalize periodic benefits in accordance with the district court's order, the accumulated value of the female's account will be greater than the male's. Upon retiring, female employees may then elect the lump sum option and immediately realize the increased value of their accounts. This is clear discrimination in favor of women. As this Court noted in *General Electric Co. v. Gilbert,* 429 U.S. 125, 139 n.17, the cost to insure against the risks in an employee benefit plan is, "in essence, nothing more than extra compensation to the employees, in the form of fringe benefits." Thus, the district court's order requiring Arizona to pay the added costs to equalize periodic benefits may well violate the Equal Pay Act of 1963, 29 U.S.C. § 206(d). By selecting the lump sum option, a woman would immediately realize the greater value of her account and receive greater total remuneration for services rendered than a similarly situated male. Even if she takes the annuity, she receives greater value for her services than the male.

[10] "Whether [the employer] apportions the contributions equally among all employees or actually contributes more for his female employees makes no difference; he knows that his pension costs are higher because he employs women. Thus, he has a powerful disincentive to hiring women, which will obviously 'tend to deprive' them of employment opportunities in violation of the statute." Bernstein & Williams, *Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum,* 78 Colum. L. Rev. 1241, 1243 (1978).

[11] The destructive effects of adverse selection in insurance have been historically documented. *See* Bailey, Hutchison, and Narber, *The Regulatory Challenge to Life Insurance Classification,* 25 Drake L. Rev. 779, 784-85 (1976).

Fourth, a "unisex" mortality table would not be a panacea. A pronouncement from the judiciary cannot change reality, and the reality, in this context, is that an individual woman has a greater probability of living longer than a similarly situated man. "Manifestly, an insurance company cannot disregard [the] fact [that women live longer then men]. . . ." *Equal Employment Opportunity Commission v. Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978) (Aldrich, J.). In *Manhart*, this Court stated that its holding did not "call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan." 435 U.S. at 718 (footnote omitted). An insurance company, in devising a "unisex" table, would necessarily be required to consider the male-female composition of the work force covered by the plan. Of course, because the "mix" would be constantly changing, the "unisex" tables would be inherently unstable.[12] And, because a plan using a "unisex" table would undercompensate men and overcompensate women, the plan would be subject to adverse selection. Kimball, *supra*, at 133-35. As one author has concluded: "If *Manhart* is extended, the result not only will be unfair discrimination against individuals because of gender, but the potential destruction of annuities and life insurance, as the inexorable effects of adverse selection work their havoc." Benston, *supra*, at 542.

If the Arizona Plan is held to violate Title VII, life annuities could only be offered by using some sort of "unisex" mortality table. Such a table would provide lower periodic payments than those now established for men, but higher

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[12] The inherent instability of a unisex plan would have the greatest impact on employers with a small workforce.

> Companies with relatively few employees probably could not use a trusteed plan because random fluctuations in their actual experience could "break the bank." Hence, they would either have to use an insurance company (if there were any that would still write annuities under a mandated unisex mortality table), not offer nonvested retirement benefits, and/or attempt to employ fewer females.

Benston, *supra*, at 540.

periodic payments than those now provided women. Thus, a woman who elected a life annuity at the unisex rates would receive a larger monthly payment than would be the case if sex-specific mortality tables were used. However, men have a free election under the Arizona Plan. They would not voluntarily choose annuities based on unisex rates, when they could obtain annuities in the open market based on sex-specific tables which more accurately reflected their life expectancy. Thus, no insurance company could successfully operate under the plan. Its unisex rates would assume some sort of a "mix" between men and women. But adverse selection would mean that they would, as a practical matter, provide annuities only for women. The consequence would be that insurance companies would no longer be able to offer life annuities under the plan, since they could not afford to provide annuities at unisex rates for women only.[13]

These consequences are certainly undesirable. They are, however, avoidable. A "common sense" and realistic recognition of the *value* of the annuity options offered to similarly situated men and women compels the conclusion that the Arizona Plan provides equality of treatment consistent with Title VII.

II. The Arizona Plan Satisfies *Manhart's* "Open Market" Exception.

In *Manhart*, this Court stated: "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." 435 U.S. at 717-18 (footnote omitted); *see General Electric Co. v. Gilbert*, 429 U.S. 125, 139 n.17. This Court's mention of the

[13] Oddly enough, this consequence would follow primarily because of the "open market" election available under the Plan. To say that the State could not legally offer the open market election would seem to be in the teeth of this Court's decision in the *Manhart* case.

"open market" exception served to allay the concerns of the insurance industry that the reasoning in *Manhart* would disrupt the long-accepted industry practice of using sex-specific mortality tables. The holding in *Manhart* was carefully limited to the facts presented, i.e., an employer-operated pension fund requiring unequal employee contributions. This Court stated: "we do not suggest that . . . [Title VII] was intended to revolutionize the insurance and pension industries." 435 U.S. at 717. Although noting that Title VII applies to an agent of a Title VII employer and that liability could not be avoided by delegating discriminatory programs to corporate shells, this Court stated: "Title VII . . . primarily govern[s] relations between employees and their employer, not between employees and third parties." 435 U.S. at 718 n. 33. The express limitations on the breadth of *Manhart's* holding, including the "open market" exception, indicate that this Court did not intend to extend the reach of Title VII to insurance practices developed and controlled independently of a Title VII employer.

The Arizona Plan in question here falls squarely within *Manhart's* "open market" exception. First, the Arizona Deferred Compensation Plan is voluntary. Therefore, state employees who do not choose to participate may receive all of their compensation in the first instance, and spend these funds or use them to purchase the largest benefit available in the open market. Second, the lump sum option affords an employee who elected to participate in the Plan the opportunity to receive his or her accumulated contributions at retirement. The accumulated contributions, which would of course be identical for similarly situated men and women, would then be available to purchase benefits in the open market.

The court of appeals found that the Arizona Plan fell outside the "open market" exception because the Plan was not limited to concededly nondiscriminatory options. By making available an option (the life annuity) which the court considered discriminatory, the court held that the petitioners violated Title VII. But petitioners merely made available a range of

options which existed in the marketplace. Petitioners made no contributions to the Plan and exercised no supervision over the practices of the insurance companies involved, or over the choices of the employees. As the district court specifically found, petitioners did not exhibit an intent to discriminate: "[the challenged] classification was not made by the defendants but rather . . . [was] the result of the insurers' judgment." 486 F. Supp. at 651.

If annuities were to be among the deferred compensation options (and, apparently, annuities are attractive to many employees, *see* 486 F. Supp. at 647), they would, of necessity, have to be provided by an insurance company which uses sex-specific mortality tables. The Council is not aware of any private insurance company which offers an annuity which does not calculate benefits in accordance with sex-specific actuarial tables. Petitioners are not responsible for the use of such tables; private insurance companies make the decision to use them in order to remain financially sound, as recognized by state insurance regulatory authorities.

The most likely consequence of finding petitioners liable under Title VII for the insurance companies' use of sex-based mortality tables will be to limit the deferred compensation options available to Arizona employees. It would be a strange result if, in the name of equality, all employees were denied the opportunity to purchase annuities of equal value to men and women and of greater value than would be available to each individual employee in the open market.[14] In fact, petitioners

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[14] Professor Kimball has stated:

> With respect, if Justice Stevens seriously meant that the only marketing arrangement his phraseology would accommodate requires accumulation of the funds until retirement and *then* payment over to the retiree who *then* goes out into the world naked and alone to shop for the best bargain in annuities, he stated nonsense. That would have revolutionary effects on portions of the insurance and pension industries, among other ways by depriving employees of the substantial benefits of the mass purchase of group insurance through the employer. It would be very wasteful and it would meet the needs of retired persons much less well. Within the open market notion must be included at least some of the real world ways in which these

(footnote continues)

have (during the pendency of this case) removed the life annuity option from the currently available offerings. This result is neither required by the meaning of discrimination under Title VII nor by an appropriate construction of the "open market" exception. Petitioners, who had no intent to discriminate as required by Title VII, should not be held responsible for the allegedly discriminatory acts of a third party.

The Ninth Circuit asserted that, because no insurance company was a party and because no insurance company had been enjoined, the McCarran-Ferguson Act did not prohibit application of Title VII to the facts presented. According to the court, "the district court has not interfered with the business of insurance." 671 F.2d at 333. But this is too formal an approach. The practical effect of this holding is to prevent insurance companies from using sex-specific tables in employers' pension plans. It is, indeed, an end-run around the McCarran-Ferguson Act. Under the decision, all insurance companies would be barred from doing business with employers on the basis of sound actuarial principles which have been sanctioned by the state regulatory authorities. And this result would be the consequence of the application of a federal statute making no reference to "the business of insurance"—in the teeth of the explicit provision of the McCarran-Ferguson Act.[15]

This holding—even though no insurance company is a party—would revolutionize the insurance and pension industries. Pension plans covering 26.1 million Americans and backed by $165.8 billion in reserves would have to be changed substantially under the Ninth Circuit's decision, with consequences which cannot now be clearly foreseen. The prevention of such an interference with an area that has been

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(footnote continued)

> matters are handled by people dealing at arm's length. The reasonable interpretation is that it includes all of them.

Kimball, *supra*, at 128 (footnote omitted) (emphasis in original).

[15] The McCarran-Ferguson Act question is directly presented by the petition for a writ of certiorari in *Teachers Insurance and Annuity Association v. Spirt* (No. 82-791).

traditionally left to the states was the clearly avowed and stated objective of the McCarran-Ferguson Act. It should not be accomplished by indirect federal regulation.

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Brief for the Petitioners, the decision of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

Aggregate Payments to Men and Women Beneficiaries Under Sex-Specific Mortality Tables

	Age 65		Age 70	
	M	F	M	F
Accumulation at Retirement	$ 10,000	$ 10,000	$ 10,000	$ 10,000
Annuity Factor	85.47629	91.44014	78.10513	85.24887
Monthly Income	$ 116.99(X)	$ 109.36(Y)	$ 128.03(X)	$ 117.30(Y)
Life Expectancy—Months	223.57(A)	263.77(B)	179.54(A)	214.41(B)
Aggregate Sum	$26,155.45(AX)	$28,845.89(BY)	$22,986.51(AX)	$25,150.29(BY)
BY—AX	$2,690.44		$2,163.78	

Assumptions: Annuity Factor based on 1983 Table "a" with interest at 12%.

Life Expectancy based on 1983 Table "a".

1983 Table "a" was adopted by the National Association of Insurance Commissioners in June, 1982.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, *et al.*,
Respondents.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE COALITION OF LABOR UNION WOMEN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE COALITION OF LABOR UNION WOMEN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women, and the Coalition of Labor Union Women (CLUW), an organization of approximately 12,000 individuals concerned with discrimination against women, particularly in the area of employment discrimination, file this brief *amici curiae* in support of respondents with the consent of the parties as provided for in the Rules of this Court.

SUMMARY OF ARGUMENT

I. This case concerns, on the merits, the application of *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, to a governmental deferred compensation program. The central question, reduced to its essence, is whether the principle, established in *Manhart*, that gender-differentiation in employee retirement programs violates Title VII applies not only to self-insured programs but to insured employer programs as well.

Since Title VII "primarily govern[s] relations between employees and their employer, not between employees and third parties," *Manhart*, 435 U.S. at 718, n.33, it is necessary at the outset to establish the scope for Title VII purposes of the employee-employer relationship. Because the National Labor Relations Act ("NLRA") covers the same relationship and because the two statutes are textually similar in relevant respects, cases decided under the NLRA are instructive here. Analysis of *Ford Motor Co. v. NLRB*, 441 U.S. 488, the NLRA case in this Court most closely in point, makes clear that deferred compensation plans are part of the employee-employer relationship and that none of the various considerations advanced here absolve the employer of responsibility for the gender-differentiated benefits paid by the plan the employer established. This is particularly true in light of the requirements, and the conceptual underpinnings, of 26 U.S.C. § 457, the tax statute that provides the major economic incentive for the deferred compensation plan at issue.

II. Unlike petitioners, many of the *amici curiae* appearing on their behalf do not confine themselves to the narrow issues properly before the Court. Instead, those *amici curiae* seek to relitigate *Manhart*, suggesting that the Court in that case proceeded without a proper understanding of insurance concepts.

1. The central contention in this regard is that gender-differentiated benefits in fact treat employees "equally"

because, given the average difference in life expectancy between men and women, a promise to pay gender differentiated benefits is "actuarily equal," or has equal "present value." But the present value of a stream of future benefits is equal or unequal depending on the classifications used in calculating that value. And *Manhart* unequivocally holds that gender is *not* a classification that may be used under Title VII in the insurance context or otherwise. 435 U.S., at 710. The reason for this ruling, as *Manhart* made clear, is that using such classifications amounts to treating all women as the average woman, with the result that women who deviate from the norm—most women—may well be harmed. Those who disagree with this conclusion are, in the end, simply in fundamental disagreement with Title VII's all but ironclad proscription against sex discrimination in employment, and with the limited nature of the exceptions in the statute to that proscription.

Nor does *Manhart* create any fundamental anomaly between the disparate-treatment and disparate-impact prongs of Title VII analysis. For, as *Manhart* held quite clearly, and as the post-*Manhart* case of *Connecticut v. Teal*, —— U.S. ——, 50 L.W. 4716 (June 21, 1982), confirms, men do not have a *prima facie* case of employmen discrimination under Title VII simply because women as a group receive higher payments *in the aggregate* from a fringe benefit program. Moreover, as *Manhart* also noted, the Bennett Amendment to Title VII, 42 U.S.C. § 2000e-2(h), would in any event provide a defense to such a "reverse discrimination" claim, because actual longevity is a "factor other than sex."

2. The *amici curiae* supporting petitioners also contend that the Court should imply an exception to Title VII to permit gender-differentiation in retirement programs; otherwise, it is said, the results could be disastrous for pension and annuity plans. Again, these same cries of doom were presented to the *Manhart* Court and rejected.

First, as the *Manhart* Court recognized, group insurance plans typically do operate without differentiating the risks attributable to various individual employees. As a matter of fairness, equal security is often seen as more important in the employment context than equal market value.

The possibiilty that Title VII's sex discrimination prohibition could cause destructive adverse selection was also faced by the *Manhart* Court. In that case, participation by employees was mandatory; the Court assessed the likelihood of "opting out" by changing employment to be slight. Similarly, in those voluntary plans where the employer provides a contribution separate from ordinary wages, "adverse selection" on purely actuarial grounds is unlikely in light of the loss to the opting-out employee of the employer contribution involved. While neither of these circumstances here obtains, both the tax advantages and the superior ratio of contributions to benefits that characterize employee group plans will discourage men from opting out *solely because of their sex.* At the very least, the employer has not presented evidence establishing otherwise.

More fundamentally, the entire adverse selection prediction itself rests on a blinkered, gender-based view of the way in which individual employees make economic distinctions. Evidence of this is that the *amici curiae* supporting petitioner *concede* that presently there is substantial adverse selection in annuity programs based on individual health and economic circumstances, yet do not explain why the programs can adjust for such self-selection but not for gender-based selection. That individuals, even after the elimination of gender-based distinctions, may continue to act primarily on the basis of their *own* economic, health, and familial circumstances and not on the basis of a statistical correlation between gender and longevity is entirely ignored.

ARGUMENT

I.

Put succinctly, the central merits question presented in this case[1] is whether an employer may consistent with Title VII knowingly and explicitly contract with an insurance company for a gender-differentiated annuity program that would, under *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, violate Title VII if operated entirely by the employer itself.[2] In effect, the State of Arizona argues that under Title VII employees are left unprotected if their employer choses to contract

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[1] Except for one brief observation (n.19, pp. 20-21, *infra*), we do not address the remedy question.

[2] The employer also suggests that the mere availability of a nondiscriminatory lump-sum option in a deferred compensation program sanctions the gender-differentiated benefit alternatively offered. This argument, apparently, would apply whenever a lump sum "actuarially equivalent" to an annuity is offered, whether the employer contracts out to an insurance company or self-insures.

This suggestion cannot be squared with basic Title VII principles. As the employer stresses, a lump-sum retirement benefit is not the equivalent of a group annuity program, for two reasons: The tax treatment is less favorable, and the periodic benefit available if the lump sum is used to purchase an individual annuity is less because of the loss of the administrative savings involved in group programs. See Pet. Br., at 14-15. To give women a choice between a less favorable gender-neutral option and a more favorable gender-differentiated option is surely " 'treatment of a person in a manner which but for the person's sex would be different,' " *Manhart*, 435 U.S., at 711, and is therefore violative of § 703(a)(1) of Title VII.

Indeed, to sanction a program structured in this way would be in effect to permit employers to coerce waiver of the rights accorded by Title VII. For example, under the suggested reasoning employers could on this same principle give employees a choice between a promotion at a gender-differentiated salary and retaining a less prestigious, lower paid position in which men and women are paid the same amount.

out the provision of its employees' "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a)(1), even if the employer in so doing expressly contracts for, and indeed invites,[3] discrimination on the basis of sex. (Cf. *General Building Contractors, Association, Inc. v. Pennsylvania*, —— U.S. —, 50 L.W—. 4975 (June 29, 1982) (employer not responsible under 42 U.S.C. § 1981 for union discrimination in hiring, where employer neither knew nor should have known of the union's discrimination.)[4]

This concept, if upheld, would have widereaching consequences for the achievement of the goal of Title VII—equal employment opportunity. For example, employers might be encouraged to give up self-insured fringe benefit programs and pension plans, now widespread especially in large industrial concerns, for insured plans. As one instance, the cost savings involved in not having to pay for pregnancy disability benefits required as a result of the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k), could be substantial.[5] More gener-

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[3] Arizona's contract procurement documents asked potential contractors to *separately* identify the monthly payments available under an annuity program for men and for women. Exh. H to First Set of Interrogatories to Defendants with Answers, R. 12a.

[4] Somewhat similar problems to those in this case arise where a union enters into a collective bargaining agreement with an employer that contains a facially discriminatory provision. However, Title VII, while holding unions responsible for their direct actions, recognizes that employers are in primary control of "compensation, terms, conditions, or privileges of employment." Title VII therefore makes unions liable for Title VII violations concerning these aspects of the employment relationship only where the union "cause[s] or attemp[s] to cause an employer to discriminate" and not where the union acquiesces in employer discrimination as to these matters. 42 U.S.C. § 2000e-2(c).

[5] It is of note that the framers of the PDA clearly understood that Title VII generally, and the PDA particularly, applied to fringe benefit programs whether the employer is self-insured or insured through an insurance company. Section 3 of the PDA,

ally, the notion would seem to insulate employers who contract with consultants to select and administer tests to job applicants, or with a management consulting firm to devise an incentive program.

Title VII cannot be so easily evaded. The statute, of course, "govern[s] relations between employees and their employer, not between employees and third parties." *Manhart*, 435 U.S., at 718, n.33. In that respect, it is like the National Labor Relations Act:

> Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place:
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> > "Section 8(a) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. . . . But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and the employees." *Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).
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> [*First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676]

Indeed, the governing language of Title VII is similar to, but broader than, the parallel language of the NLRA: While the NLRA requires bargaining with respect to "wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d), Title VII through § 703(a)(1), applies to "compensation, terms, conditions or privileges" of employment. "Compensation" is a more comprehensive term than "wages," see *Manhart*, 435 U.S., at 712, n.22, and the addition in § 703(a)(1) of "privileges" of employment points strongly toward the

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Pub. L. 95-555, 82 Stat. 2077 (1978), specifically states that the statute applies to a "person who, on the date of enactment of this Act, is providing [benefits] either by direct payment *or by making contributions to a fringe benefit fund or insurance program.*" (Emphasis supplied.)

conclusion that deferred compensation programs such as the one at issue in this case, for which individuals become eligible by virtue of being employees, are covered by Title VII's norms.[6]

Consequently, interpretations of the similar but narrower language of the NLRA are instructive in determining where, for Title VII purposes, the "relations between employees and their employer" end and "relations . . . between employees and third parties" begin. And the NLRA cases make clear that the circumstance that an employer has contracted with another person to implement an aspect of covered employment-related matters does *not* absolve the employer from responsibility under the Act, and that, in particular, employers who choose to carry out their fringe benefit programs by contracting with insurance companies do not thereby insulate themselves from the NLRA's coverage.

The most directly in point of this Court's NLRA cases is *Ford Motor Co. v. NLRB*, 441 U.S. 488. In *Ford* the employer provided in-plant food services to its employees by contracting with an independent caterer, which "furnishe[d] the food, management, machines, and personnel . . ." *Id.* at 492. Ford had "the right to review and approve the quality, quantity and price of the food served." *Id.*

The *Ford* Court held that the price of in-plant food services is a mandatory subject of bargaining, recognizing that the matter is "of deep concern to workers." *Id.* at 498. Most important for present purposes is that the Court rejected the suggestion that, because of the employer's choice to use an independent contractor to deliver that service, the service was no longer " 'an aspect of the relationship between the employer and employees.' " *Id.*, at 501, *quoting Chemical & Alkali Work-*

[6] The two acts are also similar in their definition of "employer;" both apply to employers and their agents. Compare 29 U.S.C. § 152(2) with 42 U.S.C. § 2000e(b).

ers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 176.[7] The Court held that, despite the use of an outside contractor, "the matter of in-plant food prices and services is an aspect of the relationship between Ford and its own employees. No third-party interest is directly implicated." 441 U.S., at 501. And, although Ford sought to avoid this conclusion by arguing that "prices [were] set by [the] third-party supplier," the Court refused to be dissuaded by that consideration, in part because Ford had the power under the contract to "review and control food services and prices," but also because the employer could change suppliers or subsidize the price. *Id.*, at 503.[8]

The circumstances here are conceptually identical: There is no question that as a *substantive* matter retirement plans and other frings benefit programs *are* covered by Title VII, as *Manhart* itself illustrates. Perhaps more than in-plant food prices, such programs are matters of "deep concern" to employees. Moreover, here, the employer made a choice to provide an annuity program, just as the employer in *Ford* chose to provide in-plant food services. See 441 U.S., at 498 n.10 (it is immaterial to Court's holding that the employer may not have been obligated to bargain on *whether* to provide in-plant food

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[7] Under the NLRA, even "matters involving individuals outside the employment relationship . . . are not wholly excluded" from the employer's obligations under the Act. *Pittsburgh Plate Glass, supra*, 404 U.S., at 178. Whether this is true under Title VII need not be addressed, since the benefit program here *is*, as established in the text, an aspect of the employment relationship itself.

[8] Justice Blackmun disagreed with the Court on this point, and would have recognized food prices as a condition of employment only "so long as the employer . . . has some measure of actual influence over the prices charged." *Id.*, at 565. It is doubtful whether this disagreement is here material: Since in this case the employer contracted on all the economic aspects of the annuity program, including the gender-differentiation, the employer cannot claim that the matter of benefit amounts was somehow out of its hands.

services in the first place). And, in both instances, the employer chose to use an outside party to implement the basic choice the employer had made. Further, like Ford, Arizona had an active role in establishing the economic aspects of the program by setting its bid specifications and by negotiating contracts with the suppliers. Here in fact, the benefit levels are expressly included in the contracts between the employer and the suppliers.[9] And while the employer here, like the employer in *Ford*, pleads inability to fulfill its legal obligations because of this delegation,[10] the state, like the employer in *Ford*, could if necessary make any of a myriad of changes in its contracts. The clearest demonstration of the parallel is that the *Ford* Court itself noted the similarity between the case before it and cases involving "other kinds of benefits, such as health insurance, implicating outside suppliers," noting that in each such case, "the employer contracts with a third party to provide a benefit to employees." *Id.*, at 503 n.15.

Indeed, the contention in this case that the annuity program is not an aspect of the relationship between the employer and its employees would fly in the face of the tax laws that govern the program and permit the tax advantages the program offers. Under 26 U.S.C. § 457,[11] only plans "established and maintained" by a state em-

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[9] Confirming this analysis is a line of NLRB cases concerning whether the choice of benefit plan administrators is a "condition" of employment. *See Keystone Steel & Wire v. NLRB*, 606 F.2d 171 (C.A. 7). This choice has been determined to be 'an aspect of the relationship between [the employer] and its employees without a third-party interest being directly implicated." *Id.*, at 177.

[10] While we do not here discuss the matter at length, the employer's contention that the stipulated facts establish its inability to find a company willing to provide gender-neutral benefits is, as respondents point out, an entirely unjustified reading of the stipulation.

[11] Section 457 was passed in 1978. Its purpose, however, was to enact into law the thrust of earlier Internal Revenue Service rulings governing certain deferred compensation plans. S. Rep. No. 95-1263; 95th Cong., 2d Sess. (1978), at 52.

ployers are covered, and only "individuals who perform services for the State" may participate. Also, the amount of compensation deferred remains the property of the state (§ 457(b)(6)). Conceptually then the state is paying a portion of its employees' compensation at a later time rather than at the time the employee performs his or her labor, and is *not* simply investing for the employees money already belonging to them. Otherwise, under ordinary taxation principles, the income would accrue to the employee on the date earned, and be taxable then. See S. Rep. No. 95-1263, *supra*, at 51. Thus, to maintain that this program is not an aspect of the employment relationship is to contend that an employer may pay part of an employee's regular wages on a gender-neutral basis and, by delaying payment, part on a gender-differentiated basis, a conclusion squarely in conflict with *Manhart*.

What might be the case if an employer relinquished all control over a given program—for example, if the employer simply permitted any insurance company to approach its employees to sell annuities, or any food vendor to park outside its building—is not the problem here, any more than it was in *Ford*, or in *Manhart*. And, as the *Ford* analogy shows, an employer may no more under Title VII, than under the NLRA, deny employees a statutory protection pertaining to a central condition or privilege of employment by contracting with an outside supplier.

II.

Many of the *amici curiae* appearing on petitioners' behalf range in their arguments far beyond the limited scope of the questions presented to the Court for review. Speaking the technical language of economics, insurance and actuarial science, these *amici curiae* attempt to convince the Court that *Manhart* could not have meant that Title VII demands equal periodic benefits to male and female retirees or, if that is the decision's meaning, that

the *Manhart* opinion reflects a naive, unconsidered and entirely impractical rule on the meaning of equality under Title VII as applied to employee fringe benefits.

If the arguments trooped out on behalf of these propositions have a familiar ring to them, it is little wonder. For, contrary to the implications contained in the *amici curiae* briefs filed on petitioners' behalf and in the supporting commentary critical of *Manhart*,[12] *Manhart* was not decided by a Court ignorant of the arguments traditionally made on behalf of gender-based differences in pension plans and other employee fringe benefit schemes. To the contrary, both the theoretical and the practical justifications put forward in this case are but slightly embellished versions of those presented, largely by the same groups, in *Manhart*.[13] The arguments presented by the employer there, like those presented here, were for a sweeping alteration of the established Title VII principles concerning sex discrimination. The several *amici curiae* appearing on the employer's behalf in *Manhart* argued that those principles are inherently inapplicable to cases involving insurance. This contention takes two related forms: *first*, the assertion that despite diverse treatment based squarely and overtly on gender lines, women and men are in fact being treated "equally"; and *second*, the argument that even if inequality exists, ordinary Title VII principles cannot be applied to invalidate that inequality because there is no rational alternative to using gender classifications in the insurance context.

The Court in *Manhart* chose, quite properly, to present its conclusions with regard to the application of Title VII

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[12] See especially Kimball, *Reverse Sex Discrimination: Manhart* 1979 Am. Bar Fdn. Research J. 82; Bentson, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489.

[13] See, e.g., the briefs filed in *Manhart* by the American Academy of Actuaries, the Teachers Insurance and Annuity Association and the American Council of Life Insurance.

to gender-differentiated retirement plans in legal rather than economic terms. Nonetheless, the *Manhart* opinion answers, albeit briefly, each of the arguments now once again put forward with regard both to the conceptual justification and to the supposed practical necessity for gender-based differences in pension and annuity schemes.

1. "Actuarial Equity."

(a) The first, and the central, contention made on behalf of the proposition that gender-differentiation in periodic retirement benefits does not violate Title VII is that under such a scheme men and women are in fact treated "equally." The notion is that

> In determining whether men and women annuitants have been treated equally, however, the *periodic* payments that will ultimately be received are irrelevant. In deciding whether there has been unfair discrimination, it is necessary to focus on the product purchased by the insured. The proper focus is on the contractual rights received in exchange for the price of the annuity (footnote omitted). The purchaser of a policy does not buy the amounts that will be paid upon occurrence of the event insured against; rather, the product purchases is "the *promise* that if the event occurs, the designated amount will be paid." Benstor, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 497 (1982) (emphasis in original); see Kimball *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Found. Research J. 83, 99-102. The value of the promise received in exchange for the price of the annuity policy "is measured by the present value of the amounts promised multiplied by the probability that the event insured against will occur. . . ." Benston 49 U. Chi. L. Rev. at 503. At retirement, the present value of an annuity purchased by a woman is *identical* to the value of an annuity purchased by a similarly situated man. (footnote omitted). Since the annuity plans offered

> to men and women are of identical value, there is equality of treatment consistent with Title VII. [Brief of the American Council of Life Insurance as *Amicus Curiae* in Support of Petitioners ("Life Ins. Br."), at 13-14; *see also*, e.g., Brief of the American Academy of Actuaries as *Amicus Curiae* ("Actuaries Br."), at 12; Brief *Amicus Curiae* of the National Association of Insurance Commissioners ("Commissioners Br."), at 24; cf. *Peters v. Wayne State University*, 691 F.2d 235 (C.A. 6).]

The unstated premise for this "actuarial equality" or "equal present value" argument is that it is proper to calculate "the probability that the event insured against will occur" separately for men and for women. It is true, but only in *statistical* terms, that because women *on the average* live longer than men *on the average*, it is more "probable" that a woman will live past a certain age than a man.[14] The same proposition is also true in that sense if other classifications—place of residence, smoking history, weight, genetic background for example—are used as the basis for determining the probability of an individual living past a certain age.

It may be true that many of the available alternative classifications are, for reasons of administrative cost, likelihood of fraud, or social policy considerations, less attractive to insurers than sex and age classifications. See *Bentson*, *supra*, 49 U. Chi. L. Rev., at 500-501, 519. But that does not alter the fact that each does have some statistical correlation with longevity, and therefore could be used to express the probability that a given individual

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[14] It is important to note that actual longevity—the number of years an individual does in fact survive—cannot be determined in advance. Thus, gender-based actuarial tables do *not* classify by longevity. Rather, the rule that annuity payments continue only as long as a person survives is the rule that classifies by actual longevity; paying each person equal periodic benefits that end when he or she dies is therefore the accurate way to take into account actual longevity.

will live to a given age; consequently, these classification factors are potentially relevant, on a theoretical level, in determining the present economic value to a certain person of a promise of a contingent benefit. That such factors are not used in practice for this purpose only confirms that the concepts of "present value" and "actuarial equality" are independent of the *particular* classification choice made to determine the probability portion of the equation. Thus, since "[t]he statement that some particular person is expected to live some certain number of years is dependent upon a prior decision about how to classify that person . . . . an 'equal present value' test is futile" in the sense that the "present value" of a stream of potential future benefits will be equal or unequal depending on the particular classification or classifications used in calculating that value. Brilmayer, et al., *Sex Discrimination on Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. Chi. Rev. 505, 512.

This means that the question as far as Title VII is concerned cannot be settled simply by agreeing whether it is periodic benefits or the present value of those benefits that are to be compared. Rather, the Title VII issue is whether, in translating promised benefits into present value, an employer may, consistent with Title VII, treat every woman as if her life expectancy were that of the average woman. *Manhart* speaks to this question directly:

> It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. [435 U.S. at 710.] [15]

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[15] For example, automobile insurance statistics show women on the average to be safer drivers than men. And, it may not be possible, even using other indices of safe driving, to determine which men present special risks. For this reason, insurance companies do, at least at certain ages, charge higher rates to men. Nonetheless, we

Manhart also explains quite clearly *why* classifying insurance risks along gender lines is antithetical to Title VII. The reason is that

> all individuals in the respective classes do not share the characteristic that differentiates the average class representative . . . [T]here is no assurance that any individual woman will actually fit the generalization on which the . . . policy is based. [435 U.S. at 708.]

Reading Title VII as therefore "preclud[ing] treatment of individuals as simply components of a racial, religious, sexual or national class" (*id.*), the *Manhart* Court refused to permit women's take-home pay to be affected because of a statistically accurate correlation that has no necessary application to any specific individual.[16]

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believe that an employer could not under Title VII hire only male drivers. Nor, we would think, could an employer reject male drivers, or pay them less, because of gender-based higher insurance costs.

[16] The *Manhart* principle that even accurate statistical correlations do not justify use of explicit gender lines under Title VII is consistent with the Court's Equal Protection Clause cases. In these cases as well, the Court has

> . . . rejected the use of sex as a decision making factor even though the statutes in question . . . rested on . . . predictive empirical relationships.
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> In both *Frontiero* [*v. Richardson*, 411 U.S. 677 (1973)] and [*Weinberger v.*] *Wisenfeld* [420 U.S. 636 (1975)] [this Court] expressly found appellees' empirical defense of mandatory dependency tests for men but not for women to be unsatisfactory, even though it recognized that husbands are still far less likely to be dependent on their wives than vice versa. . . . It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that *inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause*. . . . In sum the principles embodied in the Equal Protection Clause are

Reducing women's benefits rather than their take-home pay in no way alters the nature of the injury visited upon them. And, the inequity exists whether one focuses upon periodic benefits or, as the insurance industry *amici curiae* insist we must, upon some "present value" concept.

Under Arizona's plan, if Nathalie Norris were to retire at age 65, she would, under the discriminatory plan in which she is enrolled, receive $33.95 less each month than a 65-year old fellow male employee whose contribution was the same. Moreover, were each to die twenty years later, her total lifetime benefits would be $8,148.00 less than his. Jt. App., at 12. The supposed reason for this result—that women "on the average" live longer—amounts simply to the fact that *more* women than men are likely to live twenty years beyond retirement. This preponderance does not, however change the precise similarity of the circumstances of *each* woman

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not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups. [*Craig v. Boren*, 429 U.S. 190, 203 & n.13, 204, 208 (emphasis added).]

Nor is the insurance context distinguishable because it is not possible to determine with any certainty *which* women (and men) will ultimately live longer than the average person. While it would have been possible, although administratively inconvenient, to determine dependency in *Frontiero* and in *Wiesenfeld*, in other cases it was difficult or impossible to discover in advance precisely which individuals had the trait that allegedly justified the gender-based discrimination. In *Craig*, for example, "there [was] no apparent way to single out persons likely to drink and drive." 429 U.S. at 227 (Rehnquist, J., dissenting). Nonetheless, "injury to all of the young men of the state [cannot] be justified by visiting the sins of the 2% on the 98%." *Id.*, at 214 (Stevens, J., concurring). The same was true in *Stanton v. Stanton*, 421 U.S. 7: While it "may be true that girls mature earlier than boys," 421 U.S. at 14, there is probably no practical way for the state to determine which girls are more mature or which boys less mature, or to legislate on the basis of maturity rather than gender. Nonetheless, the Court in *Stanton* invalidated the gender-based line.

and of *each* man who survives for the same number of years.[17] Conversely, those women who do not survive to the age at which the "average" woman dies are, again, no differently situated as *individuals* than the larger number of men who die early. Indeed, to these women, Arizona's plan is doubly injurious: Not only are they denied the benefit of retirement income, both periodic and aggregate, equivalent to that of an exactly similarly situated man, but they must absorb a greater portion of the cost of subsidizing women who do live longer than if that cost were distributed among all employees.

If one uses a pure "present value" approach, the results are no different. For, whether or not it is efficient for plan administrators to take into account the various factors that may influence an individual's valuation of an annuity plan (or any other insurance program), individuals surely do take those factors into account, albeit not in the precise quantitative manner economists might prefer. Thus, for a woman who has smoked a pack of cigarettes a day for thirty years, or is one hundred pounds overweight, or has a terminal illness, or expects to inherit $1 million at age 75 but to be penniless before

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[17] This much-discussed "84% overlap" explanation, see Bergmann & Gray, *Equality in Retirement Benefits: The Need for Pension Reform*, 8 Civ. Rts. Dig. 25 (1975); *Norris v. Arizona Governing Committee*, 671 F.2d 330, 332 n.1, is simply a graphic way of illustrating this real-life meaning of the statistical generalities: Since, 84% of men and of women can be matched with a person of the same sex who dies at the same age, the differences in average age at death of men and women is the result of differences at the extremes, and not of differences affecting most men or most women. Put another way, this is not a situation in which the average age at death differs because 90% of men die between the ages of 65 and 70, while 90% of women die between 70 and 75. If anything, the 84% overlap explanation *understates* the point central to the legal analysis. For, in fact, for *any* woman there may be *at least one* man similarly situated with regard to actual longevity. Whether there is more than one such man, or whether there are more such women than men, does not deflect from this critical circumstance.

that, "the subjective worth" (Bentson, *supra*, 49 U.Chi L.Rev., at 503) of a promise to pay periodic benefits at a certain level after retirement may well be less than that of the "average" woman, and equivalent to that of many men. Only if employees are forced to disregard their own physical, social and economic circumstances and to view themselves only as female employees or as male employees may it be said that a promise to pay gender-differentiated benefits has equal "actuarial" value for all women and for all men.[18]

Thus, it is simply not true that the gender-based classification Arizona has used is "neutral" in the "separate but equal" sense that no economic injury, present or future, will result from that classification. Commissioners Br., at 23. Rather, the perception that a woman such as Nathalie Norris has not been disadvantaged at all is the result of a blinkered vision of employees simply as men or as women. *Manhart* unequivocally declared that the gender-based treatment dictated by such a vision is inconsistent with Title VII, for it "does not pass the simple test of whether the evidence shows 'treatment of a person which but for a person's sex would be different.'" 435 U.S., at 711.

(b) In the end the real quarrel the insurance industry *amici curiae* have is not with *Manhart*, but with Title

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[18] This latter point can be seen more sharply if one supposes an employee benefit plan that provides only disability benefits for women, and only pension benefits for men, with each benefit plan having the same "present value" in the sense that accurate probability calculations and financial assumptions were used. The scheme might be justified on the ground that more women than men have dependent's annuity coverage available to them through their husband's employment, while no dependent's disability coverage is available. That some women, given the choice, would have chosen a pension, while some men would have chosen the disability benefits can scarcely be doubted. Nor can it be said that an unmarried woman, or a man with a chronic illness, would be making an economically irrational judgment arriving at such a choice.

VII. In particular, those *amici curiae* insist that "[a]lthough Title VII sets forth a rule of per se illegality for explicit racial distinctions, no such rule pertains in the area of sex discrimination." Life Ins. Br., at 17; see also, e.g., Bentson, *supra*, 49 U.Chi.L.Rev., at 493; Commissioners Br., at 23. Title VII *does* differentiate between race and sex classifications in that two special statutory defenses to sex discrimination are stated: § 703(e), the "*bona fide* occupational qualification" ("bfoq") defense, and the last sentence of § 703(h), the "Bennett Amendment," which permits sex discrimination otherwise violative of Title VII if "authorized" by the Equal Pay Act, 29 U.S.C. § 206(d). But the affirmative prohibitions in Title VII, contained in § 703(a), treat race and sex in a precisely parallel manner, and the two express defenses must therefore be taken as the only differences between race and sex discrimination for Title VII purposes.

The "bfoq" exception is inapplicable on its face, since it is limited solely to decisions whether to "hire and employ;" discrimination as to those other matters—"compensation, terms, conditions, and privileges of employment"—covered by § 703(a)(1) cannot be justified by a "bfoq". And *Manhart*, of course, held that the Bennett Amendment does not save gender-based benefit programs, because "an actuarial distinction based entirely on sex is [not] 'based on any other factor other than sex.' Sex is exactly what it is based on." 435 U.S. at 712-713.[19]

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[19] In discussing the Benett Amendment, the Court found it unnecessary to decide "whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of "compensation" covered by Title VII." 435 U.S. at 712, n.23.

The question whether fringe benefit contributions or payments are "wages" for Equal Pay Act purposes may, however, ultimately,

Consequently, whatever the proponents of "[a] [r]evisionist [v]iew of [s]ex [d]iscrimination in [e]mployment" might prefer, Life Ins. Br., at 17, relying on Freed and Polsby, *Privacy, Efficiency and the Equality of Men and Women; A Revisionist View of Sex Discrimination in Employment*, 1981 Am. Bar Found. Research J. 585, 589, the view Congress incorporated in Title VII does not sanction an exception to the Title's equal treatment principle because some employers may find it "efficient" to use "a demonstrable statistical relationship" to calculate benefit payments. *Id.*[20] So *Manhart* unequivocally holds.

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have to be decided in a case involving the appropriate *remedy* for gender-based differentiation in pension plans. The Equal Pay Act expressly prohibits "reduc[ing] the wage rate of any employee" in order to comply with the statute's requirements, 29 U.S.C. § 206(d)(1); it has therefore been suggested that equalization of pension benefits would have to be at the rate promised for men, for some or all future benefit payments. We note in connection with that suggestion, that under the FLSA provisions of which the Equal Pay Act is a part, fringe benefits are not "wages"; if the FLSA were not so limited, employers could pay less than the prescribed minimum wage as long as fringe benefits were provided as well. Thus, benefits are "wages" under the Equal Pay Act, only if Congress used a single term differently in two parts of the same statutory section. And, if those payments are not "wages", the Equal Pay Act "topping up" provision would not apply, and more flexibility in fashioning a remedy might be possible.

We do not understand the "topping up" remedy question to be within the second Question Presented in this case, the only one pertaining to the remedy. Indeed, the District Court issued no order specifying whether the benefits of retirees must be at the former level set for men; the order required that benefits in the future be "equal" for men and women who have retired. *Norris v. Arizona Governing Committee*, 486 F. Supp., at 652. While we therefore do not in this brief pursue the matter further, we do suggest caution in evaluating any estimates of the cost of compliance with *Manhart* which assume the necessary applicability of the Equal Pay Act.

[20] Arguably, in one case this Court approved, in the absence of an express statutory exception, a distinction explicitly based on a classification covered by Title VII. In *Steelworkers v. Weber*, 443

The *Manhart* rule does not, as some of the *amici curiae* supporting peitioners and of the critical commentators suggest, e.g., Brief *Amicus Curiae* of the Equal Employment Advisory Council, at 23; Life Ins. Br., at 19; Bentson, *supra*, 49 U.Chi. L. Rev., at 505-506, 511-512; cf. Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 Va.L.Rev. 199, result in sanctioning unlawful discrimination against men (or, with regard to certain other benefit schemes or options, women). The notion is that the disparate impact prong of Title VII analysis, see *Griggs v. Duke Power Co.*, 401 U.S. 424; *Connecticut v. Teal*, —— U.S. ——, 50 L.W. 4716 (June 21, 1982), incorporates a rule that absent "actuarial equality" or equal aggregate benefit payments for men and for women (or, as the more consistent commentators concede, for blacks and white, or Christians and Jews), there is an unlawful discriminatory effect.[21] *Manhart* creates no such anomaly.

Manhart, as just noted, rejected the "suggestion that a gender-neutral pension plan would itself violate Title VII because of its disproportionately heavy impact on male employees" reasoning that "each retiree's total pension benefits is ultimately determined by his *actual life span*." 435 U.S., at 710-711 n.20 (emphasis in original). As the Court added, while "[e]ven a completely neutral practice will inevitably have some disproportionate im-

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U.S. 193, however, "the legislative history of Title VII and the historical context from which the Act arose" convinced the Court that "an interpretation of [Title VII] that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute.'" *Id.*, at 201-202. Here, the only legislative history arguably supporting the view that Title VII does not outlaw sex discrimination in benefits plans was one "isolated comment on the Senate floor" which the Court in *Manhart* viewed as entirely inadequate to "change the effect of the plain language of the statute itself." 435 U.S. at 114.

[21] Bentson maintains that "race and sex should be treated similarly with respect to insurance benefits." 49 U.Chi.L.Rev., at 512.

pact on one group or another [,] *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Id.* It could hardly be otherwise.

As the *Manhart* opinion intimates, acceptance of the proposition that Title VII requires equal aggregate benefits under each benefit program for each sex (or race, or religion, or nationality) would have a disruptive effect of massive proportions upon established benefit plans. For not only do "[v]irtually all defined benefit plans" provide gender-neutral basic monthly retirement benefits, Actuaries Br., at 5,[22] but many other types of fringe benefit plans could well turn out upon examination to provide higher aggregate benefits over some period of time to one gender, race, nationality or religion than another; whether or not this is the case, however, could only be determined retroactively.[23] Moreover, even those plans that *do* differentiate on a gender basis do not necessarily do so in a manner that precisely reflects the aggregate benefits to be paid (in the future) to the male and female employees of the particular employer involved. For example, of the plans contracted for by Arizona, one calculates female annuities based on a four-year set-back of the male table, while another uses a five

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[22] Defined benefit plans account for most of those negotiated by AFL-CIO industrial unions, and in all likelihood cover more than half the pension fund participants in the country.

[23] For example, in the Pregnancy Discrimination Act ("PDA"), Congress reversed *General Electric Co. v. Gilbert*, 429 U.S. 125, and *required* employers to provide equal disability benefits for pregnancy-related disability. The costs of doing so are significant and add to the already higher aggregate disability benefits paid to women workers. H.R. Rep. No. 948, 95th Cong., 2d Sess. 2 (1978); *Gilbert, supra*, 429 U.S. 125, 130-31 nn.9-10. Congress, however, enacted the PDA in the belief that doing so restores sexual equality in disability benefits rather than mandating a *prima facie* case of illegal discrimination. *See generally*, H.R. Rep. No. 948, *supra*; S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977).

year set-back. Exh. 3. Both cannot at once accurately reflect the true average difference between Arizona's male and female population; one or the other table will necessarily produce in the end unequal aggregate benefit payments to men and to women. Nor could it have been determined with any certainty at the time the plan was established which (if any) prediction is accurate.

Thus, neither the "aggregate benefit" approach nor its corollary, the actuarial equality theory, is to be preferred to the *Manhart* approach on the ground that adopting that theory will limit or simplify litigation on the question of the equality of employee fringe benefits. Rather, the opposite is probably true.

The *Manhart* Court did not go on to explain in detail *why*, on a *Griggs* analysis, a difference in aggregate benefits for men and for women does not establish a *prima facie* case of illegal disparate impact.[24] But the reason was made clear when the Court last term, in *Connecticut v. Teal*, further explicated the meaning of "disparate impact" under Title VII. *Teal* holds that the role of disparate impact analysis is *not* to assure equality of *outcome* with regard to employees of different sexes, races, or religion. Rather:

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create

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[24] *Manhart* did reject the sugestion that *General Electric Co. v. Gilbert, supra*, had established that a showing of unequal aggregate dollar benefits over some time period for men and women could establish a *prima facie* case of illegal disparate impact under § 703(a)(2). The Court noted that *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 expressly disavowed such a reading of *Gilbert*. *Manhart*, 435 U.S., at 716 n.29. Indeed, to read *Gilbert* in this way would be to believe that the male employees of General Electric could have brought a Title VII case, because "women drew substantially greater sums than did men from General Electric's disability-insurance program, even though it excluded pregnancy." *Satty*, 434 U.S., at 144.

> a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted. [50 L.W. at 4719 (emphasis in original).]

For:

> Section 703(a)(2) prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. [*Id.* at 4720 (emphasis in original).]

And, in a gender-neutral benefit program, while a "bottom line" difference in effect could be shown by aggregating all benefits by gender, no *individual* man is adversely affected as compared to any *individual* woman. But receive the aggregate amount of benefits to which he or she is entitled based on his or her *own actual life span* at the same monthly rate applicable to every other employee.

The second response in *Manhart* to the supposed disparate impact anomaly is that where longevity determines the aggregate benefit payments, "any differential in benefits paid to men and women in the aggregate is . . . 'based on [a] factor other than sex' and consequently immune from challenge under the Equal Pay Act, 29 U.S.C. § 206(d)" (and, by virtue of the Bennett Amendment) under Title VII as well. 435 U.S., at 710 n.20; see *also id.* at 713 n.24. Again, while *Manhart* did not pursue this point at length, the Court has had a second occasion to explore the implications of the Bennett Amendment for cases in which a sex-correlated difference in compensation is claimed to violate Title VII's disparate impact prohibition. In *County of Washington v. Gunther*, 452 U.S. 161, 170-171, the Court stated:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, pro-

scribing "not only overt discrimination but also practices that are fair in form, but discriminatory in opperation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the appliciation of the Act to wage differentials attributable to sex discrimination. H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Under the Equal Pay Act, the courts and administrative agencies are not permitted "to substitute their judgment for the judgment of the employer . . . who [has] established and employed a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong.Rec. 9209 (statement of Rep. Goodell, principal exponent of the Act).

While the Court in *Gunther* did not finally determine "how sex-based wage discrimination cases under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act," *id.* at 171, the Court *did* confirm its indication in *Manhart* that the Bennett Amendment would permit defenses to some Title VII disparate impact compensation cases, on the ground that the factor underlying the gender differential is a "factor other than sex." [25]

2. Practical necessity

Aside from the attempt to show that *Manhart* represents a wrong-headed approach to Title VII, the *amici*

[25] Of course, a "factor other than sex" must be one entirely unconnected to any gender-based discrimination. *Corning Glass Works v. Brennan*, 417 U.S. 188.

curiae supporting petitioners make a plea for an implied exception to that Title based on the *necessity* of proceeding along gender-based lines in determining pension benefits. Again, the *Manhart* Court was presented with these same cries of the impossibility of complying with Title VII principles in cases such as that, and the instant case and the Court properly rejected those entreaties.

In the first place, *Manhart* recognized and stressed a critical fact conveniently ignored by the *amici curiae* who seek to apply present-day insurance industry concepts to this situation: This is a *group insurance* program, not one sold on the open market to any interested customer.

It is true that the program in this case is far removed from the *Manhart* program in the degree to which it partakes of the potential advantages and typical characteristics of group employee benefit programs. For example, employees need not take part in the program; because there are no employer contributions, there is no necessary economic loss if an employee decides not to participate. And because employees may express some preferences as to investment and distribution of their funds, the administrative cost savings typical of group plans appear to be less. Nonetheless, the contracts are all "group" annuity contracts, e.g., Ex. 3, Ex. 4, Ex. 6; that such contracts incorporate substantial administrative and marketing savings, and therefore result in higher periodic benefits than contracts available on the open market, is a point stressed on the employer's behalf. See, e.g., Commissioners Br., at 5. Also, as we have seen (Part I, *supra*), the tax treatment of this program is similar to that accorded group benefit programs generally.

In employee *group* insurance, unlike that individually purchased on the open market, "[t]reating different classes of risks as though they were the same is a common practice that has never been considered inherently unfair." *Manhart*, 435 U.S., at 710. Thus, *all* employees are typically eligible for employment-related disability

benefits, or health insurance, or life insurance, whether or not insurance would be available to them on the market. And, as we have discussed (p. 23, *supra*), many pension plans and almost all other benefit programs make no distinctions at all among employees in the benefits provided when the insured risk occurs. Sometimes the cross-subsidies involved, if one wishes to view them that way, are huge. Many union negotiated plans, for example, provide family health coverage; obviously, in that circumstance single employees are "subsidizing" those with families in the sense that a family head would be obliged in a market transaction to pay a private health insurance company several times as much as a single individual. But the focus in employee benefits is often on equivalent security for all employees, not on equivalent market value or equivalent cost.[26]

The second strain of the necessity argument is that pension programs will be distorted or destroyed because men will not participate in the annuity plan at all or will choose lump sum options when available, or will bring pressure on employers (at least in heavily male groups) to eliminate pension plans and pay higher wages so that each employee may purchase sex differentiated pensions on the market.

Again, the *Manhart* court addressed these "self-selection" arguments and recognized that at least where participation in a pension plan is mandatory, "adverse

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[26] Even as to individual insurance, the objection that some available predictors of risk, such as smoking habits or weight, are "inefficient" to use hardly speaks to any issue of *fundamental fairness*. It could well be said to be less "fair" for nonsmokers to subsidize smokers in group life insurance than for men to "subsize" women in annuities, since smokers have volition as to their risk-increasing actions. Yet, if economic efficiency factors can justify as a matter of "fairness" failure to use available predictors even where the higher-risk person is responsible, it is all but impossible to see why concepts of gender equality incorporated in federal statutes should not do so as well.

selection" is not a real threat. 435 U.S., at 716 n.30.[27] Even where participation is voluntary, where an employer contribution is provided, opting-out is too costly to the employee to be attractive. And, the tax benefits and cost savings of group plans also make it unlikely that an employee who would otherwise choose a group annuity contract will not do so because of the availability of gender-differentiated annuities on the market. At the very least, these considerations demonstrate that the realistic possibility of significant adverse selection in a group plan setting varies widely from plan to plan, and that group plans that are gender neutral both as to employee contributions and as to benefits can be (and have been) devised which greatly minimize this problem. Consequently, a broad-swathed exception to Title VII cannot be justified on grounds of economic impossibility. This is particularly true because, as we have seen, the rule that "actuarial equality" is mandated by Title VII would produce results at least as disruptive to establish fringe benefit plans as those the *amici curiae* envisage being created by *Manhart*.

Two final comments are in order on the economic issues:

First, the *amici curiae* and the commentators upon whom they rely attempt to justify the use of only age and sex data with respect to annuities on the ground that persons in poor health will not choose annuities anyway. Life Ins. Br., at 12; Bentson, *supra* 49 U.Chi.L.

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[27] On finding that gender-based distinctions were not reasonably necessary to the employer's pension plan in *Manhart*, the Court had no reason to address the legal consequences of such a showing. We note in this regard that, at the very least, a necessity defense of this ilk would require *proof* of the necessity and not mere speculation. Here, there is no record at all on the question. There is consequently no more basis than there was in *Manhart* for broaching the major issue of whether there are any circumstances that could justify implying an exception to the carefully-thought-out scheme of Title VII.

Rev., at 518. What that means, however, is that where annuity participation is voluntary, adverse selection is already occurring. Why the annuity system has been able to tolerate only this type of adverse selection is not explained.

Second, and related, is the central consideration that all of the adverse selection prophesies suppose that individual employees will make choices about their annuities based only, or primarily, upon statistical correlations betwee life expectancy and gender. That individuals may instead act primarily on the basis of what they know about *themselves*—their health, their economic circumstances, their family situations—is not considered. Thus, even the economic analysis proffered on petitioners' behalf reflect a habit of thinking about individuals inconsistent with the gender neutral normative rule Congress stated in Title VII.

CONCLUSION

For the above stated reasons, the decision below should be affirmed.

Respectfully submitted,

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No. 82-52

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN NURSES' ASSOCIATION, AS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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BRIEF OF AMERICAN NURSES' ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

American Nurses' Association ("ANA"), as amicus curiae, submits this brief in support of the respondents. Pursuant to Supreme Court Rule 36.2 this brief is

accompanied by the written consent of all parties.

INTEREST OF THE AMICUS CURIAE

ANA is the nation's largest professional organization of registered nurses. It has approximately 165,000 members belonging to constituent associations in the fifty states, the District of Columbia, the Virgin Islands and Guam. ANA's purposes are to foster high standards of nursing practice, to promote the professional and educational advancement of nurses, and to promote the economic and general welfare of nurses to the end that all people may have better nursing care.

ANA is strongly committed to the eradication of all forms of discrimination on the basis of sex, race and other arbitrary classifications, particularly in the field of nursing care. To fulfill this

commitment ANA has participated frequently in judicial proceedings involving matters of concern to its membership. In this Court, for example, ANA participated as amicus curiae in support of the plaintiffs in City of Los Angeles v. Manhart, 435 U.S. 702 (1978).

Despite this Court's decision in Manhart, many of ANA's members continue to be affected by retirement plans which provide lower periodic benefit payments to women than to men. A great number of ANA's members are covered by such plans of the Teachers' Insurance and Annuity Association and College Retirement Equities Fund ("TIAA/CREF") at hospitals and nursing educational institutions affilated with public and private universities and colleges. ANA has been among the many groups and individuals challenging the validity of

these plans under Title VII.[1] Indeed, ANA's most active challenge to this form of gender based compensation discrimination, American Nurses' Association v. TIAA-CREF, No. C-75-558-G (M.D.N.C.), is presently stayed pending this Court's disposition of the case at bar.

What the Court does in this case, therefore, is a matter of vital concern to ANA and its members throughout this country. The nursing profession, which is largely female, has looked to the federal anti-discrimination laws to assure that the level of compensation for nurses, which is being eroded by inflation and hard ecomonic times, is not further diminished by discriminatory employment practices. ANA

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[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Opportunity Act of 1972, 86 Stat. 103. 42 U.S.C. §§2000e et seq.

is thus concerned that this case be decided consistently with Title VII's focus on individuals, not classes, and with this Court's specific rejection of actuarial or class equivalence as an exception to the statute's prohibition of discrimination against individuals. The proliferation of petitioners' amici, most of whom are trying to reargue Manhart or limit it to its facts, has heightened ANA's concern.

ANA's purpose in this case, therefore, is to demonstrate that the arguments for reversal advanced by petitioners' amici are unconvincing because they are the same arguments urged on this Court in Manhart and explicitly rejected in that case. This brief thus urges the Court to give full recognition to the breadth of Manhart's rationale so that the Congressional promise in Title VII to eradicate sex discrimination in compensation will become

an economic reality to working women covered by the statute.

STATEMENT OF POSITION AND SUMMARY

ANA supports the plaintiffs' position in this case because, in its considered judgment, Arizona's deferred compensation plan which provides smaller life annuity payments to all female annuitants solely because of their sex, is inconsistent with Title VII, as construed in Manhart.

ANA urges this Court to confine the controversy to the questions set forth in the petition for certiorari and not abandoned by the petitioners and those questions which are fairly included therein. Supreme Court Rule 21.1(a). Indeed, the abandonment by the petitioners of a portion of their petition and the consequent narrowing of this case may warrant further

consideration by the Court about the need to exercise its certiorari jurisdiction. Supreme Court Rule 17.1(a) and (c). In any event, the Court should not permit its discretionary jurisdiction to be used for relitigating the applicability of §703(a) of Title VII to retirement plans which appear actuarially fair but which discriminate against individual females in contributions or benefits. The question of the scope of Title VII's substantive coverage was settled in Manhart. Reargument of that question is nothing less than a "second bite at the apple" and ignores this Court's proper concern for the principle of stare decisis. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977); Edelman v. Jordan, 415 U.S. 651, 671 (1974).

To the extent, however, that this Court is obliged to consider the rationale of Manhart in reaching its decision, ANA

urges that full recognition be given to the Court's rejection of the "actuarial equality" arguments in Manhart and to the lack of any meaningful distinction between defined benefit and defined contribution retirement plans for purposes of determining the scope of Title VII's coverage. The argument in this brief is therefore limited to these two points.

First, the brief demonstrates that in Manhart this Court expressly and without reservation rejected the actuarial equality argument which is once again being advanced as a reason for reversal in the case at bar by TIAA-CREF, the American Council of Life Insurance ("Am. Council"), the National Association of Insurance Commissioners ("NAIC"), the Equal Employment Advisory Council ("EEAC"), the American Academy of Actuaries ("AAA") and the New York State Teachers' Retirement

System ("NYSTRS").[2]

The Court in Manhart had before it the identical proposition that retirement plans which provide actuarially equivalent benefits to male and female annuitants were not proscribed by Title VII. The rejection of actuarial equivalence as a special exclusion from coverage under §703(a) of Title VII was thus made after mature consideration of the same arguments now being urged again in this case.

Second, the brief demonstrates that the rationale of Manhart applies without dilution to defined contribution as well as to defined benefit retirement plans. Requiring all women to accept a lower level of

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[2] Brief of TIAA-CREF, pp. 20-25; Brief of Am. Council, pp. 10-22; Brief of NAIC, pp. 22-27; Brief of EEAC, pp. 15-27; Brief of AAA, pp. 11-16; Brief of NYSTRS, pp. 5-15.

benefit payments because of their sex is just as invidious as a requirement that they contribute more from their current earnings in order to obtain an equal level of retirement benefits. Manhart took account of the economic realities of retirement plans, and its rationale is broad enough to cover both forms of discrimination.

ARGUMENT

I. THE "ACTUARIAL EQUIVALENCE" ARGUMENT URGED AS A GROUND FOR REVERSAL IN THIS CASE WAS RAISED AND EXPLICITLY REJECTED IN MANHART.

Several of the amici supporting Arizona argue at length that because women as a group live longer than men as a group lower monthly retirement compensation to all women is justified because it is the "actuarial equivalent" of the higher rate of retirement compensation to all men.

E.g., Brief of TIAA-CREF, pp. 21-22; Brief of Am. Council, pp. 14-17. The same argument was made to this Court by the same parties in Manhart.

For example, TIAA-CREF argued to this Court in Manhart that an "individualistic" approach to the problem of discrimination in insured pension benefits was not realistic because "benefits of equal actuarial value for all employees upon retirement" preclude a finding of invidious discrimination. Manhart Brief of TIAA-CREF, pp. 17, 21-22. Similarly, the American Council of Life Insurance told this Court in Manhart that in a defined contribution plan the receipt by females of lower rates of retirement compensation was not discrimination prohibited by Title VII because "[i]n actuarial terms, however, the 'value' of the benefits received by both male and female employees is the same." Manhart

Brief of Am. Council, p. 20.

The so-called actuarial equality argument was refuted in detailed fashion by plaintiffs and their supporting amici in Manhart. The plea to substitute "actuarial equality" for Title VII's "anticategorical premises" was, for example, refuted at length on pages 28-43 of a brief filed jointly by the American Association of University Professors and the American Civil Liberties Union. Similarly, a joint brief filed by the AFL-CIO and the UAW demonstrated that a plan in which females are afforded actuarial equality or equivalent present value does not treat similarly situated men and women equally where women are required to make higher periodic contributions or to receive lower periodic benefits. Brief at pp. 19-24.

Furthermore, the parties in Manhart

specifically joined issue in this Court on the question of whether actuarial equality in a retirement plan entitled the plan to immunity from liability under Title VII. Petitioners' Brief, p. 4; Respondents' Brief, pp. 7-9, 20. Thus, there is no doubt whatsoever that the notion of actuarial equality, as it applies to both defined benefit and defined contribution plans, see Manhart Brief of Am. Council, pp. 19-20, was fully briefed and properly before this Court in Manhart.

In response to these arguments, this Court held in Manhart that a defined benefit retirement plan which required females to contribute more from their current wages than their male counterparts violated Title VII. 435 U. S. at 711. The rationale for this decision is that fairness to classes - the heart of the actuarial equality argument - is "essentially a matter

of policy for the legislature to address" and that Congress determined in §703(a) to foreclose reliance on the notion of class fairness, i.e., actuarial equivalence. 435 U.S. at 709. The Court justified this rationale by reference to the language of the statute which focuses unambiguously on the individual. Thus, the Court ruled that even a true generalization about the class (in this case female longevity) ". . . is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U. S. at 708. The Court also justified its rationale on the "basic policy of the statute" which "requires that we focus on fairness to individuals rather than fairness to classes." 435 U. S. at 709.

The Court's construction of the scope of §703(a) to cover discrimination in retirement plans which provide actuarially

equal benefits was thus reached after full argument and deliberation and was premised squarely on the language and policy of the statute. Putting to one side the peripheral issues about the level of participation necessary to subject an employer or its agent to liability under the statute, the holding in Manhart on the scope of substantive coverage of §703(a) is broad enough to encompass both defined benefit and defined contribution plans generally and, in particular, the plan offered by Arizona in this case.

Several of petitioners' amici, nonetheless, persist in attempting to relitigate Manhart's rationale. They point, for example, to what they regard as the special case of life annuities as a form of "insurance" against longevity, and they argue that insurers may resort to sex-segregated mortality tables in assessing risk. The

decision in Manhart, however, explictly dealt with this argument which is nothing more than an echo of the argument made by the insurance industry in Manhart (supra, footnote 2):

> Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. 435 U. S. at 710.

In determining the applicability of §703(a) to this case, therefore, the Court should give full recognition to Manhart's explicit and detailed construction of that statute and its clear rejection of the notion of actuarial equality as a defense to liability under that section. As this Court remarked in Illinois Brick Co.

v. Illinois, ". . . considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." 431 U. S. at 736. To permit this Court's certiorari jurisdiction to be used for relitigation of a recently decided issue of statutory construction would draw into question the vitality of the stare decisis principle. Exercise of this Court's discretionary jurisdiction for such a purpose would also appear to be inappropriate under this Court's Rule 17.1(a) and (c).

In any event, the Court in Manhart specifically directed the parties' attention to the role of Congress in the matter of actuarial equality. The Court said that the question of fairness to classes is "essentially a matter of policy for the legislature to address." 435 U.S. at

709. Congress, however, has remained silent on the matter of actuarial equality since Manhart, and from this legislative silence can be inferred a reaffirmation of Title VII's focus on discrimination against individuals, not classes. See Cleveland v. U.S., 329 U.S. 14 (1946).

Having failed to convince this Court in Manhart that Congress intended to exclude discriminatory but actuarially "fair" retirement plans from Title VII's coverage, and having failed to convince Congress to modify Title VII after Manhart, it is remarkable that the pension industry is now asking this Court to make this legislative choice. Such a request not only bears the stamp of futility, it also positively ignores the proper allocation of power between Congress and this Court.

In short, the clarity of this Court's construction of §703(a) after extensive

briefing from many institutions having an interest in the scope of §703(a)'s coverage, coupled with acquiescence by Congress in the Court's construction, demonstrates that the present attempt to argue actuarial equality is nothing more than a brazen challenge to the "presumption of adherence to [this Court's] prior decisions construing legislative enactments." Illinois Brick Co. v. Illinois, 431 U. S. at 736. The Court's certiorari jurisdiction is too precious to be exercised for the unseemly purpose of reargument about matters of settled statutory construction.

II. TITLE VII'S PROHIBITION AGAINST SEX DISCRIMINATION APPLIES TO DEFINED CONTRIBUTION PLANS AS WELL AS DEFINED BENEFIT PLANS.

Some briefs in support of Arizona argue that because Manhart was concerned with take-home pay and because women under Arizona's plan suffer no diminution in

current take-home pay, there is no discrimination under §703(a). For women who work, however, the practical effect of being subjected to a discriminatory "defined contribution" or a discriminatory "defined benefit" plan is the same: Women are compensated less than their male counterparts.

In fact, providing a lower level of benefits to retired women is, if anything, more invidious than requiring women to contribute a slightly larger portion of their current earnings to a discriminatory plan. Retired workers, particularly women, have fewer opportunities to supplement their income than currently employed persons who often moonlight to add to their current income. Indeed, the Congress recognized that "older workers find themselves disadvantaged in their efforts to retain employment" and that "arbitrary

discrimination in employment because of age" burdens the commerce of our nation. 29 U.S.C. §621(a)(1) and (4).

Moreover, it is unrealistic for several of the amici to speak of a "present value" for retirement benefits, for the true value of those benefits is measured by their purchasing power when received. It is, therefore, the level of benefits received, and not the actuarial quality of lifetime benefits, that is important to persons who need a retirement income. Retired persons have current expenses, not lifetime expenses, and it simply ignores the economic realities to suggest that retired women who must suffer a lower level of benefits are not being discriminated against with respect to the deferred portion of their compensation.

This economic reality - that employees are concerned with their day to day needs,

and not with hypothetical present value or actuarial equality - must be underscored. Remarkably, experts from the insurance industry themselves no longer claim that retired persons can get along on substantially reduced incomes. H. Denenberg, R. Eilers, J. Melone and R. Zelten, Risk and Insurance, pp. 283-84 (3rd. ed. 1974). These experts point out what is common knowledge: That social pressures discourage retired persons from substantially changing their way of life; that our increasingly mobile society has drawn families apart so that parents do not move to their children's homes as often as in the past; and that the basic costs of existence (food, shelter, clothing and the like) are fixed at high levels regardless of whether one is employed or not. Ibid. Congress specifically recognized these problems when it enacted ERISA to protect the "well being and secu-

rity of millions of employees and their dependents [who] are directly affected by these [employee benefit] plans." 29 U.S.C. §1001(a)-(c).

Just as Congress has recognized the economic realities of a stable and sufficient income during the retirement years, this Court, too, has recognized the importance of construing statutes by focusing on the economic realities of the subject matter to which the statute is being applied. E.g. United Housing Foundation, Inc., v. Forman, 421 U.S. 837, 848 (1975); S.E.C. v. Howey Co., 328 U.S. 293, 298 (1946). Proper regard for the economic realities of retirement benefits shows that discrimination in receipt of the benefits themselves is just as invidious as discrimination in contributions to the benefit plan.

In fact, as the foregoing discussion painfully reflects, providing a lower level

of benefits to retired women virtually condemns retired female workers whose retirement funds do not meet their needs to a poorer and meaner existence. This is the economic reality which Congress dealt with when it prohibited discrimination against individuals, not classes.[3] As this Court

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[3] The relationship between actuarial significance and economic reality was noted by that keen observer of the human condition, Charles Dickens:

"Now, this schoolroom is a Nation. And in this Nation, there are fifty millions of money. Isn't this a prosperous nation? Girl number 20 isn't this a prosperous nation and a'n't you in a thriving state?. . . .

"Miss Louisa, I said I didn't know. I thought I couldn't know whether it was a prosperous nation or not, and whether I was in a thriving state or not, unless I knew who had got the money, and whether any of it was mine. But that had nothing to do with it. It was not in the figures at all, said Sissy, wiping her eyes." C. Dickens, Hard Times for These Times, p. 52-53 (1854)(Holt, Rinehart and Winston, 1958 ed.).

pointed out in Manhart, Congress intended Title VII to eliminate the problem of unequal compensation (whether in defined benefit plans or defined contribution plans) insofar as the discrimination is based on generalizations about female longevity. 435 U. S. at 710-11.

In terms of economic realities, therefore, no meaningful distinction can be drawn between defined benefit and defined compensation plans for purposes of coverage by §703(a). The rationale for substantive coverage of retirement benefits in Manhart, therefore, amply covers this case, and the fact that Arizona offers a defined contribution plan presents no ground for reversal.

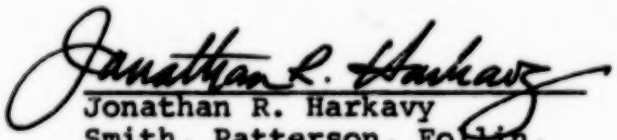
CONCLUSION

The judgment of the Court of Appeals should be affirmed on the basis of

Manhart's construction of §703(a) of Title VII.

This 5th day of January, 1983.

Respectfully submitted,



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In the Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF EIGHT INDIVIDUAL ACTUARIES AS AMICI CURIAE

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BRIEF OF EIGHT INDIVIDUAL ACTUARIES AS AMICI CURIAE

Consent to the filing of this brief has been given by counsel for both parties. Letters to this effect have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The actuaries who submit this brief as amici curiae have had extensive experience over the past 30 years with deferred compensation plans, pension plans, profit-sharing plans and other employee benefit plans.[1] Two of the actuaries are employed by large international actuarial consulting firms; two are employed by actuarial consulting units of large international insurance brokers; three are principals of regional actuarial consulting firms; and one is employed by a major labor union. They have been members of and advised federal standard-setting and licensing bodies. Several have been officers or members of the governing boards and policy making committees of the national professional actuarial organizations. The group includes the author of the textbook on pension actuarial mathematics recommended by the actuarial organizations which jointly sponsor the federal Enrolled Actuaries pension examination, and the co-author of the first modern pension mortality table designed to be used both with sex-distinct and sex-neutral rates.

The actuaries who submit this brief work primarily with sponsors of employee benefit plans. Some also consult with insurance companies. All have been employed by insurance companies and, like most other actuaries, have been employed by those who sell insurance or sponsor other

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[1] The eight individual actuaries are: Arthur W. Anderson, Richard Daskais, Donald S. Grubbs, Jr., Paul H. Jackson, Lawrence Mitchell, J. Reuben Rigel, Conrad M. Siegel and Howard Young. Seven are Fellows and one is an Associate of the Society of Actuaries, the organization which is principally responsible for education and examinations of life insurance and pension actuaries. All eight are Enrolled Actuaries under ERISA and are or have been members of the American Academy of Actuaries. Biographies of the actuaries are attached to this brief as Appendix A.

financial security programs. Their experience includes work for both large and small organizations and clients.[2]

The American Academy of Actuaries ("Academy") has filed a brief as amicus curiae which purports to represent the views of the actuarial profession in the United States and purports to describe for this Court "the potential effect of this Court's decision on the various types of plans." (Academy Brief at 2). There is, however, responsible actuarial opinion which differs from the opinions expressed in the Academy's brief.

We submit this brief to assist the Court in evaluating the effect that affirmance of the judgment of the court below would have on the State of Arizona, employer-sponsors of pension plans, and the insurance industry. This brief does not address the legal issues relating to Title VII's application to Arizona's plan, but rather the questions which concern us as actuaries. We agree that gender is an important characteristic in evaluating life expectancy. We do not agree, however, with the prediction of the Academy, the American Council of Life Insurance ("ACLI"), and the National Association of Insurance Commissioners ("NAIC") that prohibition of the use of sex-distinct bases for calculating the amounts of annuity benefits would be unworkable and lead to the "withdrawal" of annuities from deferred compensation plans and retirement programs. It is our opinion that implementation of the judgment of the court below is feasible and need not cause major disruptions in the pension or insurance industry.

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[2] The opinions expressed in this brief are those of the eight actuaries and do not necessarily reflect the opinions of their employers, clients or the actuarial organizations to which they belong. None of the individuals has any direct or indirect financial interest in this case.

SUMMARY OF ARGUMENT

In *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), this Court held that a defined benefit pension plan violated Title VII because a female employee was required to contribute more than a similarly situated man, although both received the same monthly pension benefits. In this case, the courts below held that the Arizona deferred compensation plan violated Title VII because a female employee who elects the annuity option offered by the State receives a smaller monthly benefit than a similarly situated male.

In their briefs, the Academy, the ACLI and the NAIC have argued to this Court that, unlike *Manhart*, affirmance of the judgment below would have a major impact on a great variety of plans currently in existence. We recognize, of course, that affirmance would require changes in the operation of certain plans. We do not believe, however, that prohibition of the use of sex-distinct bases for calculating annuity benefits would materially affect the pricing of annuities or disrupt the insurance industry. Arizona could have sponsored a plan that provided equal monthly benefits to males and females, either by specifying that the insurers use sex-neutral rates or by providing annuities for employees on an uninsured basis.

The severe adverse selection predicted by these amici is not borne out by experience. Employees deciding between an annuity or an alternative form of benefit do not generally make actuarial appraisals of their own life expectancy. Nor do they consider that they may be subsidizing another group. Rather, their primary considerations are investment return and income taxes.

A change to sex-neutral rates would not impair any expectations male employees have as to benefits they will

receive upon retirement. Nor would the use of sex-neutral rates in pricing annuities alter significantly the benefit males would receive.

If the judgment below is affirmed, the insurance industry would not be revolutionized. Insurers have in the past protected themselves against adverse experience by including substantial safety margins in annuity premium rates. These margins are required more because of uncertainty as to future investment returns than because of uncertainty as to the mortality of the annuitants; they will be more than sufficient to insulate insurers against lower average mortality rates. In the past, the insurance industry has demonstrated its flexibility and adaptability as approaches to risk classification have changed. There is every reason to expect that it will continue to do so.

ARGUMENT

Introduction

Arizona has established a deferred compensation plan which permits a State employee to realize certain immediate tax savings by deferring receipt of a portion of his or her compensation.[3] The deferred amount remains the property of Arizona until paid to the participant. Participation in the plan and the amount each employee defers are discretionary. A participant may elect to receive his or her benefit (1) in a single sum, (2) in a fixed monthly sum for a specified time period, or (3) in the form of a life annuity. If the participant elects a life annuity, Arizona requires that it be purchased from one of the life insurance companies selected by the State. All the insurance companies selected use annuity purchase rates which differ by sex. As a result, females receive smaller monthly annuity payments than males of the same age who have accumulated the same account balance.

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[3] The Arizona plan is governed by Section 457 of the Internal Revenue Code of 1954, 26 U.S.C. §457 ("Code"). The intent of Section 457 is to allow employees of state and local governments to defer compensation, to obtain a present tax advantage and to enjoy the benefits of present employment at a later date. Employers do not contribute to the plan. Congress has also provided tax advantages for employee retirement plans. Under Section 401(a) of the Code, an employer may establish pension plans, profit-sharing plans and stock bonus plans. Pension plans must provide for payment of benefits over a period of years. 26 C.F.R. §1.401(b)(1). Profit-sharing plans, however, may provide benefits in any form, including lump sums. Therefore, contrary to the impression conveyed by the Academy's brief (Academy Brief at 4), there is no indication of any Congressional intent that all retirement plans provide life annuities.

Under the Arizona plan, a female employee who elects a life annuity option will receive a smaller monthly benefit than a similarly situated male who defers an equal amount of compensation. To receive the same amount of monthly benefit as a similarly situated male, a female must defer a greater amount of compensation and consequently will receive less take home pay.

I.

ARIZONA COULD SUCCESSFULLY OPERATE ITS PLAN ON A SEX-NEUTRAL BASIS.

A. Actuarial Solvency Does Not Depend on the Use of Sex as A Means of Risk Classification for Annuities.

The Academy and the ACLI suggest that elimination of sex as a means of risk classification will destroy the financial soundness of an insurance program. (Academy Brief at 9-11; ACLI Brief at 11, 19). The history of life insurance and annuity pricing practices demonstrates that insurers are able to adapt to conditions and to make reasonably accurate predictions without using every means of risk classification. In the first half of the century, life insurance was priced by age and by underwriting class related to health, occupation, and "morals". Sex and policy size were not used for pricing. It is only relatively recently that the insurance industry has relied upon sex to classify risks in pricing life insurance. Davis, *The Current Position of the American Actuary*, 9 Transactions of the Society of Actuaries 317, 322-23 (1957).

The adoption of sex differences in pricing life insurance was at least in part based on competitive factors. Although females on the average bought smaller life insurance policies than men, insurance companies did not charge greater rates, per $1000 of insurance, for small policies. They justified sex-neutral pricing because the higher

expenses of the smaller policies women purchased were offset by lower mortality. In the 1950's, insurance companies began to price life insurance on the basis of policy size. Shortly after they made this change, some insurers lowered the prices they charged women to reflect their lower mortality rates in order to compensate for price differentials based on policy size. The price reduction for women is often accomplished by an age setback. In pricing life insurance, insurers generally use a three year age setback for females, while in pricing annuities, they use a four to six year age setback. This difference does not simply reflect differences in mortality experience. It indicates that rates also reflect competitors' practices.

Moreover, insurers refrain from using other characteristics to classify risk, such as race, which reflect the cost of bearing the risk assumed, because those classifications are not socially acceptable. Shepherd and Webster, Selection of Risks (1957). At one time, race was a factor in the pricing and availability of life insurance. The major insurance companies limited their issuance of policies to blacks through marketing and other means. Certain specialty companies, primarily located in the South, concentrated on sales to blacks. The result was two classes of insurance companies. *See, e.g.*, 29 Transactions of the Actuarial Society of America 30 (1928); Green, Examination for Life Insurance 109 (1906). With changes in attitude and law, the major insurance companies have issued insurance policies to blacks without price distinctions based on race.

There are other statistically valid factors, such as smoking, weight and medical history, which insurers use to predict longevity in pricing life insurance but which they

do not use in pricing annuities. For example, mortality differentials between smokers and non-smokers on the average exceed those between males and females. Cowell and Hurst, *Mortality Differences Between Smokers and Non-Smokers*, 32 Transactions of the Society of Actuaries 203 (1980). Annuities, however, are generally not priced on the basis of health, or any factors which predict longevity except sex and age.[4] In pricing annuities, insurance companies do not use all the factors, including sex, that are statistically valid predictors of longevity or that are used in pricing life insurance.

B. Investment Return Is the Principal Factor in Pricing Annuities.

The Academy, ACLI and NAIC assert that elimination of sex-distinct mortality tables will interfere with the pricing of annuities. Sex, however, is not a critical factor in the pricing of annuities for employer plans. Interest rates are far more important. Almost all annuity premium rates, such as the rates in the Lincoln National contract, guaranteed in advance under retirement plans, incorporate heavy safety margins to protect the company against adverse experience. The safety margins are required principally because insurers cannot accurately predict the investment return that will be available in the future when they

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[4] In certain situations, insurance companies do consider health and occupation in pricing annuities. For example, differences in mortality by occupation are used in pricing single premium group annuity contracts purchased by terminated pension plans in industries whose employees have below average prospects for longevity. On the other hand, insurance companies have successfully priced annuities without using age. For example, in the pricing of black lung annuities for miners, insurance companies do not use age as a factor, but instead distinguish between those miners who work in anthracite coal mines and in bituminous coal mines. See, *e.g.*, *Pennsylvania Coal Mine Occupational Disease Coverage*, Penna. Dept. of Insurance (Nov. 1982).

receive premiums. The uncertainty of annuitants' mortality is of minor concern. These safety margins are more than adequate to cover any excess of cost of a predominantly female group over the sex-neutral cost of an average group. Therefore, the Academy's assertion that use of sex-neutral tables would mean that the "current practice of guaranteeing annuity purchase rates long in advance would likely have to be modified" is incorrect. (Academy Brief at 17).

Use of sex-neutral rates would result in a small change in the annuities guaranteed in advance to participants. In the case before the Court, Norris is guaranteed a monthly annuity of $320.11 beginning at age 65. A similarly situated male participant is guaranteed a monthly annuity of $354.06. Each of these annuities is a 10 year certain and life annuity. If Lincoln National used sex-neutral annuity rates, we would expect that the amount of annuity it would guarantee a participant of either sex at age 65 would be about $337 monthly, midway between the $320.11 for a female and the $354.06 for a male. If Lincoln National experienced the worst adverse selection—only females electing this annuity—it would be paying $17 per month, or about 5.3%, more for each participant than it would if it used the sex-distinct contract rates.

The Lincoln National rates in effect at retirement can be expected to provide Norris a larger annuity than the annuity based on the advance guaranteed rates.[5] The advance guaranteed rates are based upon 3.5% interest. During December 1982, long term U.S. Treasury Bonds generally yielded about 10½%. Assuming Lincoln National, after allowance for margins, based its actual annuity premium rates on 7.5% interest, Norris' monthly annuity

[5] Section 2.07 of the Lincoln National contract provides that a participant's annuity will be based on its rates in effect at retirement, if more favorable than the advance guaranteed rates.

would be approximately $443 or about 38% more than the $320.11 annuity under the guaranteed rates.

The actual market annuity purchase rates available in 1982 demonstrate that advance guaranteed annuity purchase rates are very conservative. The table below shows the annuity that could have been bought during 1982 from Metropolitan Life Insurance Co. ("Metropolitan"), a company considered to be a major factor in the fixed dollar annuity market. This table also shows annuities based on rates guaranteed in advance by Lincoln National.

10 Year Certain and Life Annuities at Age 65
Monthly Annuity Bought by $53,890.93

Month in 1982 Annuity Purchased	Metropolitan Life Insurance Company—Non-Participating—Fixed Payment Qualified Plans—Group Contract[6]	
	Male	Female
January	$621.20	$583.33
February	621.20	583.33
March	621.20	583.33
April	605.89	567.34
May	650.77	614.22
June	635.26	598.05
July	650.77	614.22
August	643.04	606.10
September	605.89	567.34
October	598.25	559.29
November	575.38	535.53
December	575.38	535.53
Lincoln National Contract Elected by Norris		
As Stipulated—Joint Appendix	354.06	320.11
With One Year Adjustment Per Exhibit 3, §2.07[7]	344.90	312.03

[6] Source: contracts issued to large funding institutions and consultants.

[7] The stipulated amounts do not reflect the premium for a one year adjustment of age pursuant to Section 2.07 of the Lincoln National contract.

The significant difference between the guaranteed premium rates provided to Norris, which produce the annuity amounts in the lower portion of the table, and the 1982 Metropolitan rates suggests that, when Norris does retire, Lincoln National will offer her rates that will produce substantially higher monthly income than either the male or the female rates guaranteed under its contract. The experience of Teachers Insurance and Annuity Association ("TIAA"), whose program for colleges and universities is the largest of its type, provides further evidence that guaranteed rates are not important in determining the amount of retirement benefits which ultimately are paid. The TIAA program calls for equal contributions regardless of sex, mandatory payment of benefits in the form of a life annuity, and sex distinct annuity purchase rates. According to TIAA's figures, guarantees made at the time contributions were paid to TIAA accounted for only 36% to 52% of the amounts paid in 1980 to typical annuitants who retired in 1970-1979. The remainder came from dividends, primarily attributable to favorable investment experience.[8] This example illustrates the magnitude of safety margins in advance guaranteed annuity premiums.

The table also reveals the relative importance of sex and investment return. At age 65, for a 10 year certain and life annuity, there is a price difference of about 7% between males and females (or 3½% between either sex

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[8] See Affidavit of Richard Daskais dated April 21, 1981 in support of Opposition of EEOC to Defendants' Motion Relating To Good Faith Reliance, etc., filed in *Spirt* v. *Teachers Insurance and Annuity Association*, 475 F.Supp. 1298 (S.D.N.Y. 1979), *aff'd*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 9, 1982) (No. 82-791).

and a sex-neutral table calculated on a mix of 50% females and 50% males).[9] Changes in interest rates, however, caused a price variation of 12% within this one year period. Consequently, a 65 year old female could have purchased a larger annuity in January, February, March, May, June, July and August than a 65 year old male with the same accumulation could have purchased in November and December. The volatility in interest rates is such that Metropolitan publishes more than a dozen rate tables for the use of its policyholders and notifies policyholders by telegram on the first day of each month as to which table is applicable for that month. Investment return is therefore more important than sex for pricing annuities.

C. The Requirement of Sex-Neutral Tables Will Not Result in Serious Adverse Selection or Market Disruption.

Briefs of certain amici assert that adverse selection will result from sex-neutral annuity pricing. They predict that male annuitants will object to what they perceive to be a subsidy of female annuitants and will make sophisticated actuarial choices, with the result that (1) the financial security of plans will be threatened; (2) choices will be withdrawn; and (3) employees of one sex will be adversely affected. We disagree with these predictions.[10]

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[9] For example, the April 1982 male annuity of $605.89 is about 7% greater than the female annuity of $567.34. The 50%/50% sex-neutral annuity would be $586.61 or about 3½% greater than $567.34.

[10] The Academy reminisces on the "burial society" experience where premiums and assessments for death benefits were set without regard to the age of an individual member resulting in an "assessment spiral" of costs as the average age of members increased. (Academy Brief at 10). This example is not analogous to the

(footnote continued)

In our experience, employees do not make the decision to elect a life annuity primarily on the basis of actuarial appraisals of their expected longevity. To the contrary, employees frequently incorrectly assess their prospects for longevity. For example, a 65 year-old employee who has heard that life expectancy at birth is 69 may assume only four years of life remain.[11] To such an employee, a life annuity often appears to be a poor choice, whether priced on a sex-distinct or sex-neutral basis. Employees do not avoid life annuities because they believe they are subsidizing another group. No one has suggested, for example, that any programs are having financial difficulties because smokers or overweight people have not elected annuities.

Employees make choices between lump sum payments and annuities primarily on the basis of tax considerations and the investment return they can earn on the lump sum. Also, employees choose among optional forms of annuities for reasons other than an opportunity for adverse selection. For example, in our experience, the choice of a joint and survivor annuity is based upon the prospec-

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(footnote continued)

situation before the Court. The sex related difference in mortality of four to six years is not comparable to the 50 to 70 year age difference of persons for whom the rates would be identical if life insurance were priced on an age-neutral basis. More analogous is the example of premium rates for group life insurance for which employees pay the entire premium. These rates are usually set in five or ten year ranges on a sex-neutral basis without the "revolutionary" consequences predicted.

[11] Life expectancy at 65 is approximately 17 more years. The 69 year life expectancy at birth includes the persons who have died prior to reaching age 65 as well as those who die after reaching age 65.

tive outside income of the spouse, family net assets, the amount of life insurance on the employee's life, and the employee's estimate as to whether he or she can afford to live on the reduced total family income that would be available under a joint and survivor annuity.[12]

The Academy and ACLI argue that an employer retirement plan that used sex-neutral factors would be at a disadvantage because male participants would elect to take their benefits as a lump sum and purchase larger annuities from outside insurers when they retire. (Academy Brief at 18; ACLI Brief at 20). It is unlikely that a male participant in the Arizona plan would elect a lump sum in order to purchase an annuity, because the plan does not offer the same tax benefits to participants who elect a lump sum payment.[13] Moreover, use of sex-neutral rates should not fully offset the advantages to a male employee of purchasing an annuity through Arizona's plan. Because an annuity purchased by the plan is tax-favored and

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[12] A study of the 1958-1960 experience of a large industrial employer prepared by one of us showed that the election of a joint and survivor pension appears to be determined primarily by the size of the employee's pension. The greater the pension the greater the likelihood of joint and survivor election. 13 Transactions of the Society of Actuaries 205 (1961).

[13] All benefits under the Arizona plan and other Section 457 deferred compensation plans are taxable as ordinary income in the year received. Consequently, a participant who elects to receive a substantial lump sum would pay taxes at a higher average rate than he or she would pay if the benefits were spread over a lifetime annuity. In contrast, lump sum benefits under Code Section 401 qualified retirement plans are generally accorded a favorable income tax treatment, either ten year averaging or further tax deferral through a "rollover" to a tax-favored arrangement.

has lower administrative and sales expense, it would almost certainly be greater than the sex-distinct annuity purchased outside the plan.

D. The Arizona Plan Could Have Used Sex-Neutral Rates.

Arizona could have specified that each insurer use sex-neutral rates for annuities for its plan. If it had done so, the insurers could have set adequate annuity premium rates by predicting the mortality of the participants who would purchase annuities. To make these predictions, the insurers could have assumed that a larger percentage of females than males would purchase single life annuities, and that most joint and survivor annuities would be for a male and a younger female.[14] In addition, the insurer could have anticipated that most of the participants with substantial accumulated accounts would purchase annuities in order to retain their significant tax advantages.

As the Academy points out, in developing sex-neutral tables for each defined contribution plan which requires the payment to be in the form of an annuity, the insurer would take into account the proportion of male and female participants. This consideration will not, however, cause the disruptions or dislocations the Academy suggests. (Academy Brief at 18-19). First, as discussed above, *supra* at 13, annuity premium rates change frequently because of changes in investment returns. Any differences caused by the sex mix of the participants would be less

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[14] Our single life annuity assumption is not in conflict with the 50%/50% illustrations of the effects of changing to sex-neutral rates, *supra* at 12-13, because there are more male than female participants. For example, if a plan covers 1,000 males and 500 females, and 20% of the 1,000 males and 40% of the 500 females elect a single life annuity, there will be 200 single life annuitants of each sex.

significant. Second, to the extent that the sex mix of the participants varies materially from the mix the insurer initially used in pricing the annuities, the insurer will make the same type of adjustment it now makes to compensate for variations in investment return.

Alternatively, Arizona could have provided, at no cost to itself, annuities for employees on an uninsured basis. One of us recently recommended to a major statewide deferred compensation plan that it provide life annuities on an uninsured basis as a means of increasing annuities for all participants in the plan. Defined contribution plans which provide life annuities on an uninsured basis have operated for many years. Examples are the plans operated for most colleges and universities in the United States by College Retirement Equities Fund (which, unlike TIAA, is not an insurance company), the thousands of plans operated for many years by National Health and Welfare Retirement Association, and plans of a number of major employers in the airline and securities industries.

It is feasible for an uninsured plan to use sex-neutral annuity rates. For example, the Cooperative Banks Employees Retirement Association in Massachusetts is an uninsured defined contribution plan which uses sex-neutral rates for determining benefits. This plan changed to sex-neutral rates after the *Manhart* decision at the same time as it raised from 8% to 9% the assumed interest rate used to calculate annuities. The change in the interest rate more than compensated for decreases in male benefits caused by elimination of sex-distinct rates. All persons who retired after the date of the change have received larger annuities than they would have under the sex-distinct rates, with greater increases for females. The plan continues to operate on an actuarially sound basis.

II.

AN EQUAL VALUE STANDARD WOULD REQUIRE CHANGES IN GROUP INSURANCE PLANS AND DEFINED BENEFIT PENSION PLANS.

The Academy argues that if this Court affirms the judgment of the court below, there will be significant effects on other plans. The Academy then argues that this Court should construe Title VII to require only that women receive equal value. (Academy Brief at 12-16). If this Court considers the Academy's argument for an equal value standard, it should also consider the implications of using such a standard.

This standard would require changes in benefits in virtually all group insurance. Men and women now receive equal group insurance benefits. In each type of group insurance, there would be a difference in expected value between men as a class and women as a class for any group of employees. Because mortality rates of women are lower than those of men, the amount of life insurance provided to female employees would typically have to be increased; we estimate the increase would be from 30% to 50%. For some employee groups, the value of disability income insurance is greater for women than for men; consequently, certain employers would have to increase the amount of disability income for male employees. For other employee groups, the value of disability income insurance is greater for men than women; in these instances, employers would have to increase the amount for female employees. Under many types of medical expense plans, including those of most large employers, the value of male employees' insurance is greater than that of female employees because a greater percentage of employed males have insured dependents.[15]

[15] For example, under the program of a large industrial client of one of us, 91% of the male employees have dependents, but only 74% of the female employees have dependents.

If an equal value standard were used, in many defined benefit pension plans the benefits of females would have to be increased. For example, many plans provide pensions that are the same percent of salary for all employees. Under such plans, the value of pensions as a percent of salary is usually lower for female employees as a class than for male employees as a class, because females as a class have higher turnover rates and a smaller proportion of females have spouses eligible for survivor benefits. These factors more than offset the females' greater life expectancy.

III.

COMMENTS ON THE IMPACT OF AFFIRMANCE.

Although this case involves only a deferred compensation plan under Section 457 of the Code, the Academy has presented some predictions of the practical impact of this Court's opinion on all defined contribution and defined benefit plans. (Academy Brief at 16-23). It is our opinion that affirmance of the judgment of the court below will not create insurmountable problems with respect to defined contribution or defined benefit plans that are "qualified" retirement plans, *i.e.*, not deferred compensation plans under Section 457 of the Code.

The Academy asserts that defined contribution plans which permit participants to choose between a life annuity and a lump sum would present opportunities for adverse selection. (Academy Brief at 17). Our experience is that the vast majority of employees elect lump sums when they have a choice because of the favorable tax treatment. Annuity premium rates have little effect on the choice. Insurance companies could avoid any significant adverse selection by accurately predicting the sex mix of the small percentage of participants who elect annuities.

The Academy contends that a decision requiring equal monthly benefits would materially affect optional benefits available under defined benefit plans. (Academy Brief at 19-20). However, many defined benefit plans have used sex-neutral option factors for over 20 years.[16]

The Academy suggests that it would be undesirable to use sex-neutral tables to compute benefits under joint and survivor options of defined benefit plans. It notes that similarly situated employees entitled to the same normal monthly pension under plans of different employers would receive different joint and survivor benefits. (Academy Brief at 19). But similarly situated employees of different employers already receive different joint and survivor pensions, primarily because their plans have widely different benefit formulas.

The briefs already filed discuss the effects on Arizona and sponsors of other employee plans if this Court were to order "prospective" or "retroactive" relief in this case. The Academy asserts that prospective relief which required the use of sex-neutral factors for employees who retire after the Court's decision in this case would result in "widespread and substantial adjustments of currently anticipated benefits." (Academy Brief at 27). We disagree.

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[16] These plans often specify a formula for calculating the amount of a participant's joint and survivor annuity, rather than requiring actuarial equivalence to the life annuity. The formula is designed so that the actuarial value of the joint and survivor annuities will be about the same as the actuarial value of the life annuities of the participants who elect them. For example, one formula of this type provides a joint and survivor annuity equal to 79% of the participant's life annuity if the participant and spouse are the same age, with further provision for reducing (or increasing) the 79% factor by .8% for each year that the participant's age exceeds (or is less than) the spouse's age.

Under defined contribution plans, expectations as to benefits are not firm prior to retirement because of the uncertainty of investment earnings.[17] For example, the values of the accounts of those employees who have invested in common stocks, in either a trust fund or an insurance company "separate account," have changed more between August and November of 1982 (when stock prices rose 30% to 35%) than they would change because of the use of sex-neutral tables.

Under defined benefit plans, only optional forms (*e.g.*, joint and survivor annuities) will be affected. Employees' expectations, however, are based almost entirely on what they would receive under the normal form of annuity.

If Arizona is required to increase annuities which have already commenced, it will incur some costs. The record in this case contains no evidence of what those costs may be. The Academy asserts that the cost of "topping off" to all retirement plans has been estimated "at anywhere from in excess of $1 billion to several times that amount annually". (Academy Brief at 26). The ACLI refers to "an in-

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[17] The Court in *Spirt* v. *Teachers Insurance and Annuity Association*, 691 F.2d 1054, 1068-69 (2d Cir. 1982) rejected on two grounds the argument that males in either the TIAA or CREF plans could have expectations of receiving benefits based on sex-distinct mortality tables. In the first place, TIAA-CREF distributed literature which emphasized the difficulty in accurately predicting the amount of retirement annuity income an individual participant could expect to receive. Second, the minimal monthly payments TIAA guaranteed were so low, *viz.*, *a* 2½% return on investments, that the males' expectation of receiving the guaranteed benefit would not be jeopardized by "the relatively minor" changes in the value of past benefits the court's order would require.

ternal study conducted by the Council" which "estimates that a prohibition against using sex-specific actuarial tables could increase the costs of retirement plans by as much as two billion dollars per year". (ACLI Brief at 3). No source or basis is provided for these estimates.

CONCLUSION

Assuming that the judgment below is affirmed, there need not be major disruptions in the pension or insurance industry. Implementation of the judgment below is feasible.

Respectfully submitted,

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Dated: January 8, 1983

APPENDIX A

Biographies of the Eight Individual Actuaries

Introduction

The Society of Actuaries is the dominant American and Canadian educational and examination organization for actuaries in the life, health, and pension fields. Completion of all its examinations leads to Fellowship in the Society. Each of the eight actuaries is a Fellow of the Society except for Mr. Anderson who is an Associate. Messrs. Grubbs and Jackson have been members of the Board of Governors of the Society.

The Conference of Actuaries in Public Practice is an organization for consulting actuaries whose requirements for Fellowship generally include Fellowship in the Society and consulting experience. Six of the eight actuaries are Fellows of the Conference; Messrs. Rigel and Young are not. Mr. Mitchell is a past president of the Conference and Mr. Siegel is currently a vice president of the Conference.

All eight are Enrolled Actuaries under ERISA.

Six of the eight actuaries are Members of the American Academy of Actuaries. Messrs. Daskais and Jackson were charter members of the Academy, but have resigned.

Individual Biographies

Arthur W. Anderson is Vice President and Actuary in the Boston office of Johnson & Higgins, a large international firm of insurance brokers and consulting actuaries. He has been a member of the Advisory Committee on Actuarial Examinations of the Joint [U.S. Departments of Labor and Treasury] Board for the Enrollment of Actuaries since 1980, the federal body which enrolls actu-

aries to perform actuarial services under ERISA. He is the author of a textbook on pension plan actuarial mathematics to be published in 1983 by the Society of Actuaries and the American Society of Pension Actuaries. His employment experience includes 18 years of pension consulting for companies of all sizes, and 2 years of life insurance company employment.

Richard Daskais is a consulting actuary in Daskais & Walls, Inc., a Chicago actuarial consulting firm. He has been a member of the Advisory Committee on Actuarial Examinations of the Joint Board for the Enrollment of Actuaries since its formation in 1976. His employment experience includes 25 years of pension consulting, primarily for large companies, and 7 years of life insurance company employment.

Donald S. Grubbs, Jr. is a consulting actuary in the Washington office of George B. Buck Consulting Actuaries, Inc., a large international actuarial consulting firm. He was formerly Director of the Actuarial Division of the Internal Revenue Service and was the first chairman of the Joint Board for the Enrollment of Actuaries. He has 27 years of pension actuarial experience, working with plans of all sizes.

Paul H. Jackson is a consulting actuary in the Washington office of The Wyatt Company, a large international actuarial consulting firm. He has written more than 30 papers for professional actuarial journals and employee benefit journals and several chapters for textbooks. He is co-author of the UP-1984 mortality table which is one of the principal tables used for pension plans; the table was designed to be used on a unisex or sex-distinct basis. His

employment experience includes 18 years of pension consulting primarily for very large companies, and 15 years of life insurance company employment.

Lawrence Mitchell is a consulting actuary in Mitchell & Hartmann, Inc., a Los Angeles actuarial consulting firm. His employment experience includes 18 years of pension and insurance company consulting, for organizations of all sizes, and 9 years of life insurance company employment.

J. Reuben Rigel is a consulting actuary in Powers, Carpenter & Hall Inc., a St. Louis consulting actuarial unit of Corroon and Black, a large international firm of insurance brokers and consultants. His employment experience includes 8 years of pension consulting for companies of all sizes, and 8 years of life insurance company employment. He has been in the private practice of law.

Conrad M. Siegel is a consulting actuary in Conrad M. Siegel, Inc., a Harrisburg, Pa., actuarial consulting firm. He has been a member of federal and state government consultant and research committees. His employment experience includes 23 years of pension consulting for companies of all sizes, and 3 years of life insurance company employment.

Howard Young is special consultant to the president of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and is also director of its Social Security Department. He joined the UAW staff in 1960 and (with other employment 1971-1974) has had a wide range of assignments in public economic and social policy as well as in collective bargaining and employee benefits. He has had 10 years of life insurance company employment.

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR
TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION
PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and
all other similarly situated,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Court**

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Court

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae in support of the petitioners with written consent of all parties. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the em-

ployer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d). Although this case arises under Title VII, the affirmative defenses of the Equal Pay Act have been incorporated into Title VII "to permit employers to defend against charges of [sex] discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.'" *County of Washington v. Gunther*, 101 S. Ct. 2242, 2248 (1981).

EEAC's members are vitally interested in the issues presented in this case. The lower courts found that the employer violated Title VII because one option of its voluntary deferred compensation program was a lifetime annuity which employees could purchase from one of several insurance companies that relied upon sex-based mortality tables. Because of those tables, female annuitants would receive smaller monthly payments than male annuitants.

There are virtually no insurance industry-provided life annuity plans that do not use similar longevity tables. This is true whether the annuity is purchased on an individual basis or through employer-sponsored group programs. This Court previously has recognized that a retirement plan would not be unlawful under Title VII if

male and female contributions were equal as long as the plan also "let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 718 (1978). The Arizona plan here provided the open market option sanctioned in *Manhart*. Arizona, however, was faulted by the lower courts for further assisting its employees to purchase life annuities from insurance companies by presenting them with a choice of policies from several companies that had been screened by the employer for participation in the program.

The Ninth Circuit's decision puts at risk virtually any employer-operated or sponsored retirement, pension or deferred compensation plan where payments are based upon industry-accepted standards. A large portion of the annuities in this country are offered pursuant to employer-operated or sponsored plans which are thus rendered vulnerable. The Ninth Circuit's approach therefore would, contrary to this Court's previous assurance, make Title VII the vehicle to "revolutionize the insurance and pension industries." *Manhart* 435 U.S. at 718. Moreover, if the decision is not reversed, most employers will eliminate the life annuity option from their retirement and pension programs, as has Arizona (Pet. for Cert. at 5). Employees thereby forced onto the open market would lose the benefit of lower group premium rates, and their annuity payments still would be based on sex-related actuarial tables. Because of these potential effects, this case is of manifest concern to EEAC's members, much of private industry and public employers.[1]

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[1] Because of its interest in the relationship between the sex discrimination provisions of Title VII and the Equal Pay Act, EEAC participated as amicus curiae before this Court in *County of Washington v. Gunther*, 101 S. Ct. 2242. EEAC's strong interest in the proper burden of proof requirements of Title VII also is evidenced by its participation in several other cases before the Court. *See*

STATEMENT OF THE CASE

The Arizona Deferred Compensation Plan (the "Plan") was a savings and investment plan established by the state legislature that permitted state employees to defer compensation and, consequently, taxation on that income. Participation in the plan and its various options was completely voluntary. No employer contributions were made under the plan. Employees who chose to participate had a number of options for investment and receipt of proceeds of the plan. At the time of investment, participants could choose to defer their compensation in savings accounts, mutual funds, life insurance, and various annuities (e.g., annuities for a fixed amount, for a fixed period, or life annuities). At the time of withdrawal, participants had several options: (1) lump sum withdrawal of the accumulated proceeds with the discretion to invest the amount in the annuity market for the largest annuity available; (2) receipt of a fixed annuity sum for a fixed period; or (3) participation in a group life annuity program in which the employee would receive a certain amount of money each month for life. The last withdrawal option is at issue here.

Norris, a female employee, chose to participate in the plan and to have her funds invested in a life annuity to be provided by a private company unconnected with the State government. Arizona selected several possible companies with which the employees could invest for a life annuity. It was stipulated that all insurance companies available to Arizona used sex-based mortality tables to compute the monthly amounts due under the life annuity contract. (Cert. Pet. at 3). Under the plan selected by Norris, as with all similar plans which use sex-based mortality tables, similarly situated women and men made

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United States Postal Service Board of Governors v. Aikens, No. 81-1044, *decision pending; Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

the same contributions into the life annuity program. Because, however, women live longer than men and, as a group, would receive a benefit of equivalent value over a longer time period to men as a group, female annuitants are paid less per month than male annuitants. Females choosing either the lump sum or the fixed amount/fixed period options, however, would receive the same payments as male annuitants in those programs.

Norris challenged the life annuity part of the Plan, alleging that it violated the sex discrimination provisions of Title VII because of the lower monthly payment to women. Both the district court and Ninth Circuit found the Plan to be discriminatory. The courts acknowledged that the life annuity portion was voluntary and that the employees had several other options from which to choose. Also, the district court's finding that the discrimination was not intentional was undisturbed by the Ninth Circuit. Nevertheless, they ruled that an employer may not offer a fringe benefit resulting in lower monthly payments to females.

Relying almost exclusively on this Court's decision in *Los Angeles v. Manhart*, 435 U.S. 702, the Ninth Circuit, in a 2-1 decision, held that sex-based mortality tables ignored the rights of individual female employees who might not live as long as the mortality tables would indicate. In dissent, Judge Nielsen in *Norris* stated that the plan falls clearly within the *Manhart* "open market" exception. (Pet. App. at A-11).

As a remedy in *Norris*, the employer was ordered to pay retired female employees supplementary amounts so that their future monthly annuity payments would equal those received by similarly situated retired male employees. (Pet. App. at A-3).

SUMMARY OF ARGUMENT

The Arizona life annuity option does not impermissibly differentiate between male and female employees, is based upon valid factors other than sex and falls within the market exception to the *Manhart* decision. The Ninth Circuit's decision misreads *Manhart* and would thwart the Congressional intent recognized therein by effectively forcing employers and employees to make drastic changes in their life annuity programs.

The application of sex-related longevity tables in this case is distinctly different from that found unlawful in *Los Angeles v. Manhart*. Unlike the mandatory retirement plan in *Manhart*, Arizona's option was voluntary and did not require all female employees to receive less take home pay than equivalent male employees. Rather, employees had the discretion to defer their compensation into a large number of options. One option, which concededly did *not* violate Title VII was to withdraw contributions and purchase a life annuity on the open market. Another option, found unlawful, was to purchase a life annuity from the private insurance market through insurance companies screened by the employer. In either event, the insurers based their monthly payments on sex-based actuarial tables that considered employee longevity as much as possible.

The *Manhart* decision stressed that it would not be unlawful

> for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

434 U.S. at 717-18. The Arizona life annuity option cannot be significantly distinguished from the concededly valid lump sum option, as both involve voluntary purchases from private insurance carriers. The life annuity

option, moreover, contains significant advantages by allowing the individual female employee to enjoy full tax deferral benefits plus the advantage of a group insurance rate. If this plan does not fall within *Manhart*'s open market exception, that exception is rendered a nullity. Affirmance of the Ninth Circuit's opinion would thus have the effect of eliminating life annuity programs as presently used.

Arizona's life annuity plan concededly is not intentionally discriminatory. Moreover, it does not differentiate unlawfully on the basis of sex. Both male and female employees receive the same income and same present value of an insurer's promise to continue lifetime payments. "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme." *General Electric v. Gilbert*, 429 U.S. 125, 138 (1976). Since the option "offers female and male annuitants benefits of equal value[, it] does not violate Title VII." *Peters v. Wayne State University*, 29 FEP Cases 1753, 1757 (6th Cir. 1982). Moreover, because the annuity payment differentiates between women and men on the basis of longevity, it is not comparable to the retirement program in *Manhart* which discriminated against every female employee and inevitably caused her to receive less protection than all males. *Peters v. Wayne State*, 29 FEP Cases at 1757. Although the longevity-related plan would "distinguish in a crude way between male and female pensioners, because of the difference in thei. average life spans," the Court in *Manhart* stated that "[i]t is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize." 435 U.S. at 713 n.24.

ARGUMENT

I. CONTRARY TO THE INTENT OF CONGRESS AND THIS COURT'S *MANHART* DECISION, THE NINTH CIRCUIT'S OPINION WOULD REVOLUTIONIZE EXISTING PENSION AND RETIREMENT METHODS AND WOULD NULLIFY PURCHASE OF LIFE ANNUITIES ON THE OPEN MARKET

A. Introduction

The Ninth Circuit's opinion misapplies this Court's decision in *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, and misconstrues Title VII's sex discrimination provision as it relates to compensation and benefit systems. The decision below ignores explicit limitations which this Court placed on *Manhart's* liability holding and demonstrates a lack of understanding of the legal ramifications of the insurance options involved. Moreover, the mere presence of a sex-related annuity table led the court to conclude, improperly, that the life annuity option impermissibly "treat[ed] men and women differently"[2] so as to constitute unlawful Title VII discrimination.

As we show below, the record demonstrates no improper differential treatment on the basis of sex and, in any event, there are valid and reasonable nonsex-related purposes for the use of insurance mortality tables. Affirmance of the decision below would cause a major upheaval in the annuity and insurance programs adopted by numerous public and private employers. For these reasons, the decision of the Ninth Circuit should be reversed and vacated.

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[2] *Norris v. Arizona Governing Committee*, 671 F.2d 330, 334 (9th Cir. 1982), *cert. granted*, U.S. No. 82-52; Pet. App. at A-6. The court also erred in holding the employer liable for assisting employees in choosing a benefit provided by insurance companies that relied in turn upon proven, industry-accepted actuarial practices. For the reasons stated fully in Arizona's brief, it should be concluded that "Title VII . . . primarily governs relations between employees and their employers, not between employees and third parties." *Manhart*, 435 U.S. at 718 n.33.

B. Arizona's Life Annuity Option Fulfilled the *Manhart* Open Market Exception and Offered Significant Benefits to Female Participants Over Individual Life Annuity Purchases

Because the legislative history of Title VII's sex discrimination provision is "notable primarily for its brevity,"[3] the courts have been careful not to expand its reach to cover well-established business practices that are not based upon direct evidence of purposeful sex discrimination. As stated in *Willingham v. Macon Tele. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975):

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. *Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate* (emphasis added).[4]

This same restraint was required in this Court's decision in *Manhart*, but was notably absent from the Ninth Circuit's decision below.

Manhart presented a situation markedly different from the option involved in this case and from annuity programs adopted by public and private employers generally. In order to take into account the undisputedly

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[3] *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976).

[4] In examining allegations of sex-based compensation discrimination, the courts have warned that judges and administrative agencies should be cautious about substituting their judgment for that of employers where there has been no showing of intentional discrimination. *See generally, County of Washington v. Gunther*, 101 S. Ct. 2242, 2249 (1981); and *Kouba v. Allstate Insurance Company*, 30 FEP Cases 57, 59 (9th Cir. 1982). *See also General Electric Co. v. Gilbert*, 429 U.S. 125, 140 n.18, 145-46 (1976), which cautioned against using Title VII to expand traditional concepts of discrimination.

longer life expectancies of female retirees, the employer in *Manhart* established its own retirement plan which *required* all eligible female employees to contribute more into the pension fund than similarly situated eligible male employees. Thus, without having any choice, every eligible female employee "took home less pay than a male employee earning the same salary." 435 U.S. at 705. This plan, therefore, distinguished employees *solely* on the basis of sex. All women would receive smaller paychecks because of their sex—even those who would not live as long as the average male. The Court recognized that the Department's contribution schedule "distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees." 435 U.S. at 713 n.24.

This Court went to great lengths, however, to assure that its *Manhart* decision would be narrowly applied and to make clear that it was not establishing hard-and-fast rules that would invalidate more common industry usage of mortality tables. The Court stated:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a *requirement* that men and women make unequal contributions to an *employer-operated* pension fund. *Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.* Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan. Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief. (Emphasis added, footnotes omitted).

434 U.S. at 717-18.

The Ninth Circuit below, in assuming that Arizona's life annuity option was facially discriminatory, impermissibly ignored the key element of the *Manhart* exception. As noted, this Court in *Manhart* specifically stated that if contributions were equal for members of each sex, it would not be unlawful to let each retiree purchase the largest benefit which his or her accumulated contribution would buy from the individual's own search of available annuities on the market.

This case presents an ideal manifestation of the market option envisioned by *Manhart*. Whether purchased by individuals or through employer-sponsored group plans, life annuity payments are based upon the life expectancies of the individuals involved. As *Manhart* recognized, most retirement or related plans have a common factor—the plans depend upon anticipated funds to cover contingencies and "[t]he amounts set aside are determined by a painstaking assessment of the insurer's likely liability." 435 U.S. at 721. Annuities purchased on an individual basis from the insurance company of the person's choice still will pay female annuitants less per month than will be paid to equivalent male annuitants.[5]

With this fact in mind, not only did the Arizona plan meet the requirements of the market exception, its practical effect was to place women in a more favorable financial position than if they had gone to the market as individuals. The three options available under the Arizona plan illustrate this point. The Ninth Circuit recognized that the lump sum option "treats men and women the same" (671 F.2d at 335). Women who use the lump sum option to purchase individual life annuities, however, would have to draw their funds out of the group

[5] In its brief to the Ninth Circuit below, the American Council of Life Insurance (ACLI) indicated that it was not aware of any private insurance company offering life annuities to the general public, which offers an annuity that does not calculate benefits in accordance with sex-based actuarial tables. See ACLI Brief Amicus Curiae at 22, n.32.

plan and would lose the tax deferral benefit of the plan. They would find, moreover, that the annuity purchased with the reduced proceeds would provide even smaller monthly payments than under Arizona's life annuity option and they still would receive payments based on sex-related actuarial figures.

Equivalent male and female employees exercising the second option—a fixed sum for a fixed period—would receive equal payments as the number of payments for both sexes would be readily identified. 486 F. Supp. at 648. Of course, if their payments raised them to a higher tax bracket they would pay income tax on their retirement at a faster, and possibly greater rate than they would with life annuity payments under the third option. The second, fixed payment option also presents a decided disadvantage as compared with a life annuity for those persons who might live for enough additional years to receive a greater payout under a lifetime rather than fixed payment schedule.

Most employees, therefore, selected Arizona's third option—the lifetime annuity—probably because of its decided advantages over the lump sum payment which concededly was not unlawful. Life annuities purchased under the third option were purchased on the open market, albeit from one of several possible companies that had been screened by the employer. Recognizing that eligible female employees were completely free to go to other insurance companies, the employer nonetheless provided a valuable service. It assisted annuitants in the painful task of making their own market survey of insurance companies. At the same time, the optional plan retained all deferred income advantages. It also provided higher monthly payments to both males and females because the increased size of the annuitant group permitted more accurate actuarial calculations than would individually-purchased life annuities.

All of the *Manhart* open market requirements, therefore, were met: all options, including the life annuity,

were voluntary, not required; and the contributions by equivalent male and female annuitants were the same. Moreover, the group life annuity purchaser was placed in an enhanced payout position over individual "lump sum" option purchasers. Such an option is *a fortiori* authorized by Title VII when compared with the concededly lawful lump sum payment that is inherently less favorable to female employees.

C. Employer and Employee Responses to the Decision Below Could Disrupt or Even Eliminate the Market for Life Annuities

From the perspective of both private and public employers, the Ninth Circuit's reliance upon *Manhart* to find that Arizona's plan violated Title VII eviscerates *Manhart's* assertion that Title VII was not intended to revolutionize insurance and pension industry practices. As a practical matter, it could lead to the elimination of life annuities from employer-sponsored deferred compensation and retirement plans. Arizona, of course, has discontinued the option. (Pet. for cert. at 5). And even if those plans were not eliminated outright, pension and annuity participation would be changed drastically. The lump sum payment option would become even more undesirable, as female employees would choose the employer-sponsored group life annuity option in anticipation that the employer would be required, as by the Ninth Circuit, to equalize annuity payments for similarly situated male and female employees even if, as here, no employer contributions were contemplated.

As another response, the employer could consider switching to "unisex" tables and provide equivalent life payments to both male and female annuitants. But because the Equal Pay Act would prevent the employer from decreasing monthly payments to male employees in order to equalize payments, the payments to the female

annuitants would have to be increased.[6] *See also, Peters v. Wayne State University*, 29 FEP Cases at 1757. The increased monthly payout to female employees, however, would require an increase in premiums to be paid either by plan participants—both female and male (assuming no Equal Pay Act problems)—or by the employer. If the plan is voluntary, individual males or male-dominated groups and institutions would be likely to move out of annuities with substantial female participation and join with other predominately male groups so as to avoid increased premium payments.[7] Thus, from the employer's standpoint, the life annuity option would be drastically altered. At the same time, however, the use of other insurance plans based upon different actuarial computations would raise a host of difficult and unresolved legal questions.[8]

In sum, the Ninth Circuit's decision not only ignores the market exception provided by *Manhart*, but, in addition, myopically assumes that equal benefits can be provided to employees of both sexes under all circumstances without either directly or indirectly causing a detriment to employees of one sex. By incorrectly concluding that

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[6] The Equal Pay Act states in relevant part that:

> an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1).

[7] See Bentson, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 538-40 (1982); and Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Fdn. L. Rev. 82, 134-35.

[8] *See, for example, EEOC v. Colby College*, 589 F.2d 1139, 1144-46 (1st Cir. 1978), which discusses the problems *Manhart* did not resolve concerning the use of actuarial tables that did not consider sex-related longevity figures. Such plans would require additional premiums to be paid either by the employer (who might choose to drop all life annuity programs) or the male employees (who might sue on the basis that their increased premiums were illegally tied

Title VII simply dictates equality of benefits regardless of sex under all conditions, the court below ignores the fact that its mandate that Arizona provide equal benefits would nonetheless adversely affect members of both sexes in the manner described above. Title VII does not dictate such a simplistic approach. As *Manhart* recognized, there is no express or implied authorization from Congress to interpret Title VII in such a draconian manner. Moreover, as the following discussion demonstrates, the plan under review here was not discriminatory against female employees and would not fall within Title VII's proscriptions in any event.

II. ARIZONA'S PLAN DID NOT DIFFERENTIATE IMPERMISSIBLY BETWEEN MALE AND FEMALE PARTICIPANTS

A. Arizona's Life Annuity Option Did Not Treat Women Differently than Men Because Similarly Situated Males and Females Received Equivalent Value in Return for Equal Contributions

Not only did the Ninth Circuit misapprehend the applicability of *Manhart's* open market exception to this case, it also misapplied well-established Title VII principles which negate an argument that Arizona's plan involved either unequal treatment or sex discrimination. These standards recently were summarized by the Sixth Circuit in *Peters v. Wayne State University*, 29 FEP Cases at 1755-56:

> Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely

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to sex-based factors). *See also Sobel v. Yeshiva University*, 477 F. Supp. 1161, 1166 (S.D.N.Y. 1979), which explains, as does the brief of petitioner, the difficulties faced by the employer who wishes to provide a life annuity option and finds that all available insurance plans use sex-based annuity tables.

forbids the employer from acting with the intent to discriminate. *Furnco Construction Co. v. Waters*, 438 U.S. [567, 579-580 (1978)]. See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. Id. at 254, citing *Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate nondiscriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

There is no question that the Arizona plan was not intentionally discriminatory against females or that it was not a pretext for intentional discrimination. The district court's holding that intent was not proven was not disturbed by the Ninth Circuit.[9] The sole basis, therefore, for the Ninth Circuit's finding of a Title VII violation was its conclusion that the plan was "facially discriminatory" (Pet. App. at A-6; 671 F.2d at 334) because the plan offers "a benefit which favors men" (*Id.* at 335; Pet. App. at A-9). That premise is unsupportable. As now shown, Arizona has articulated legitimate, nondiscriminatory reasons for its offering of an annuity plan through insurance companies that use industry-wide

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[9] See 486 F. Supp. at 651; 671 F.2d at 332. Pet. App. at A-11; A-21.

"acceptable actuarial standards." *Peters*, 29 FEP Cases at 1756.

There is no dispute that "[a]s a class, women live longer than men" (*Manhart*, 435 U.S. at 704) or that the sex-based actuarial tables used by the insurance companies in this case were an accurate and bona fide approximation of the greater longevity of women.[10] As the district court described the tables:

> The parties further agree that for those persons who elect annuity options, the payouts are subject to mortality tables which are published in the contract with the particular company. These payments are calculated on the basis of the present worth of the person's account at the time payments are to begin divided by the months a person of that age and sex is expected to live, and factored by any guaranteed payment period. Because according to the annuity tables females as a class live longer than men as a class, the period of time for which payments are to be made to women would be longer than for men and thus, the periodic payment to women is less than for men. The amounts received are determined by the use of actuarial tables published by the particular company.

486 F. Supp. at 648; Pet. App. at A-15. The sole basis for the lower court's sex discrimination finding is the lesser monthly payments received by female life annuitants. This fact alone, however, does not amount to an unlawful distinction between the sexes.

The employer in *Manhart* used annuity tables to differentiate between male and female employees on a much different basis than the employer in the instant case or employers generally. To finance the greater pension benefits that women as a group would receive, the Department in *Manhart* required women to contribute more

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[10] "Like King Canute, neither the Congress nor a court can change the forces of nature" that result in women generally living longer than men. *EEOC v. Colby College*, 589 F.2d at 1144.

than men. Each individual woman took home less income than a man who performed the same job. As a result each and every female employee "earned less money than men for the same jobs" no matter how long she actually lived after retirement. *Peters v. Wayne State University*, 29 FEP Cases at 1756.

Because every women would suffer from the application of a sex-based stereotype, use of the tables in *Manhart* thus was discriminatory in the same fashion as is a blanket exclusion of individually qualified women from jobs traditionally held by males because of sex-based stereotypes. Sex-based mortality tables, however, have a markedly different nature. They treat females as individually as is feasible in light of the unknowable length of each individual life. "Unlike the possibility, for example of properly testing job applicants for qualifications before employment, there is simply no way to determine in advance when a particular employee will die." *Manhart* 435 U.S. at 724 (Justice Blackmun, concurring).

Title VII, moreover, provides a defense to allegations of sex discrimination where employees of one sex have been excluded from certain positions on the basis of a bona fide occupational qualification (BFOQ) where, among other things, it is impossible or highly impractical to deal with persons affected by the rule on an individualized basis (i.e., individual examinations would not enable an employer to distinguish the qualified from the unqualified). *See e.g., Diaz v. Pan American Air World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1972).[11]

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[11] *Cf.*, EEOC's BFOQ guidelines under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq., which have borrowed Title VII's sex discrimination BFOQ standards and which permit the employer to demonstrate that "some of the individuals so excluded possess a disqualifying trait *that cannot be ascertained except by reference to age.*" (Emphasis added). 46 Fed. Reg. 47725 (codified at 29 C.F.R. § 1625.6).

Unlike the plaintiffs in *Manhart*, similarly situated male and female beneficiaries of most retirement or deferred income plans make equal contributions toward their annuities, take home the same income and, at the same time, are eligible to receive in the future a pension or annuity of *the same present value to each individual*, even though the future annuity payments are computed by the use of sex-based actuarial tables.

By focusing exclusively on the dollar amount of each separate, periodic payment to female annuitants, the Ninth Circuit disregarded other important characteristics that validate the annuity plan. As noted, men and women receive identical payments for work performed. There is, however, a substantial time difference between payment of compensation for the work performed and the receipt of retirement benefits. The funding for defined contribution plans is certain; the actual aggregate payments are not and cannot be fully determined until all participants in the plan are deceased. Because of these uncertainties,

> *If any part of either wages or contributions is to be paid in the future, a proper valuation procedure requires that part to be discounted to present value as of the time the work is performed.* If any part is to be paid only on the contingency that the employee is still alive, it must also be *discounted* by the probability that the employee will survive. Only in this way can the compensation be made commensurable with other compensation and then compared with it. It does not matter that the interest rate for discounting purposes and the actuarial probability for ascertaining whether payment will be made at all are, at best, only informed estimates. *Not to use such a discounting procedure is to assume that money has no time value and that all employees will certainly survive to some future date, both of which assumptions we know to be erroneous.*

See Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Am. Bar Fdn. Res. J. 83, 98.

Thus, under a plan in which payments are based on sex-related actuarial tables, equivalent male and female employees are treated the same if they make equal payments into a retirement or deferred compensation plan, or if the employer makes identical contributions into the fund for similarly situated male and female employees. Both groups receive the same present value from the protection and guarantee provided by an insurance-type product for which the employer has provided or made available to employees of both sexes. Accordingly, "[i]t is the employer's [equal] payments toward the insurance policy or arrangement (or the present or actuarial value of the future benefits) that is the compensation, not the periodic payout derived from the policy." Kimball at 102.

Over the term of the payout period, of course, male and female annuitants can have both similar and widely varying experiences. Members of each group may die early, or live far beyond the actuarial estimates. All, however, will receive the benefit of the insurer's or employer's promise that periodic annuity payments would continue until their death. In that respect, all employees are treated identically. As one commentator has explained:

> To understand insurance, one must realize that *the purchaser of a policy is not buying the amount that will be remitted should the unwanted event occur, but the promise that if the event occurs, the designated amount will be paid.* Thus both the insured who does not die during the period covered by the life insurance policy and the insured who does [die] have purchased and received the same product. Similarly, after a life annuity contract has been executed, an annuitant who lives for thirty years and an annuitant who dies the next day have *both received the same product* for their money . . . . *Therefore, insurance necessarily involves circumstances in which the events insured against will not be precisely*

predictable, and in which the payments made to individual insureds will not be equal.

Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 497 (1982).

Sex-differentiated tables, moreover, are widely used by the insurance industry and employers to calculate the present value of retirement benefits to individuals. The common and widely accepted explanation of the use of these tables may be set forth as follows:

> It is quite possible that in the present state of our knowledge, age and sex are the only two facts about the individual that will significantly help us—at reasonable cost—to calculate probable length of life. Whether available complementary information should be used too to further refine (complicate) the classification system should depend on a cost-benefit analysis. But if looking at relevant facts about the individual is what the statute commands, it is absurd to ignore sex to refine the calculations as far as possible at reasonable cost, merely because no other variables are both useful and manageable.

Kimball, 1979 Am. Bar. Fdn. Res. J. at 120.[12]

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[12] Some have argued that insurance companies or employers discriminate on the basis of sex when they use sex-related annuity tables, but do not use other possibly relevant tables based upon the life expectancy of smokers, drinkers or heavy eaters. Nonuse of such factors, however, does not indicate that sex-based tables are discriminatory. Where feasible or economical, those other factors are commonly relied upon by companies in underwriting other types of policies. Indeed, use of such factors might benefit the insurance company who could use them as a basis for higher premiums or less policy coverage. See Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 Employee Benefits J. 8, 38 (1976).

Use of those other factors in the annuity area, however, may not be practical as a general practice. Because smoking, obesity and other health problems often shorten the life of the individual, lump sum payments or life insurance are often more attractive. Thus, it

Sex-related annuity tables, therefore, are not relied upon merely because certain annuitants are female. The sex of annuitants, along with age, constitute a rational and substantiated element in determining the longevity patterns of the beneficiaries of life annuity programs.[13]

To summarize, the Arizona plan was not facially discriminatory because the employees were treated equally, whatever their sex. All employees were totally free to decide whether to participate in the deferred compensation plan and had several options concerning the annuity program, if any, in which to participate. All received the same take-home pay and identical present value and expectations of their selected life annuity. Unlike *Manhart*, no differentiation between male and female groups occurred.

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could be expected that a person who has developed health problems from factors such as smoking might well choose a life insurance program, rather than a life annuity designed to benefit those who live longest. *See* Benston, 49 U. Chi. Law Rev. at 518. "Because of this self-selection for individually purchased annuities and because employment annuities are paid only to people who are well enough to retire, insurers assume that annuitants are likely to live longer than people in general, and the mortality tables take this expectation into account" (*Id.* at 518-19). Insurers, moreover, have experienced that factors such as smoking, heredity, or personality problems may be misrepresented by the insured, may not be subject to sufficient statistical experience or do not predict the annuitant's condition at the time the annuity is to be paid. (*Id.*) As discussed above, however, there is detailed and virtually undisputed evidence of a statistically significant correlation between sex and longevity.

[13] It is also true that sex-based mortality tables often *favor women*. Indeed, with respect to employer-sponsored individual life insurance plans, the almost universal practice is to charge females *lower* premiums than males. Benston, 49 U. Chi. L. Rev. at 532 n.135.

B. Under *General Electric* and *Geduldig*, There is No Unlawful Title VII Benefit Discrimination If Each Class Receives Equivalent Protection and Value from the Program

As shown, the plan in question does not involve direct compensation but the determination of the equality of benefit plans. This Court's decisions in *General Electric v. Gilbert*, 429 U.S. 125, and *Geduldig v. Aiello*, 417 U.S. 484 (1974), readily dispose of the Ninth Circuit's conclusion here that the benefit plan is impermissibly discriminatory between the sexes. The Supreme Court in *General Electric* began its analysis by noting that "[a]s in *Geduldig*, we start from the indisputable baseline that '[t]*he fiscal and actuarial benefits of the program . . . accrue to members of both sexes*,' 417 U.S. at 497 n.20." 429 U.S. at 139 (emphasis added).[14] The Court in *General Electric* further explained (429 U.S. at 138):

> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense the "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.*, at 496-497, 94 S. Ct., at 2492. *As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.* . . . (Emphasis added).

The Court indicated that the plan in *General Electric* had not been shown to "discriminate against any definable group or class in terms of the aggregate risk protec-

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[14] Although Title VII was amended in 1978 to expand the definition of sex to include pregnancy and related medical conditions in the wake of the Court's decision in *General Electric*, the amendment does not affect the Court's analytical framework with respect to evaluating the equality of benefits in general. See 42 U.S.C. § 2000e(k).

tion derived by that group or class from the program." 429 U.S. at 138. In the Court's view, the plan was "nothing more than an insurance package, which covers some risks, but excludes others . . . ." (*Id.*) The Supreme Court stressed in *General Electric* that "gender based discrimination does not result simply because an employer's disability benefits plan is less than all inclusive." 429 U.S. at 138.

General Electric further stated that "absent proof of different values" (429 U.S. at 139 n.17), the cost of insuring against future risks is essentially extra compensation. The Court noted that if the employer were to discontinue the benefit and increase wages by the same amount, "there would clearly be no gender based discrimination," (*Id.*) even if the female would have to pay more than a male employee to purchase disability insurance on the open market. Thus, under *General Electric*, an employer cannot be required to pay an additional amount in benefits to female employees merely "because of their differing roles in the 'scheme of human existence' " (429 U.S. 139 n.17). Having provided similarly situated male and female employees a benefit of equivalent present actuarial values, the employer in *General Electric* was not required by Title VII to do more.

General Electric and *Geduldig* recently were relied upon by the Sixth Circuit to reverse a district court finding that Title VII was violated by a retirement program under which female employees paid equal premiums as, but received smaller monthly retirement payments than, similarly situated males. Dismissing the suit, the court held that the "retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women." *Peters v. Wayne State University*, 29 FEP Cases at 1757. The court in *Peters* correctly noted that:

> Common sense supports this holding. Plaintiffs point out that individual women may not live to the pre-

> dicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age. (Emphasis in original).

29 FEP Cases at 1757. For the reasons stated, the Ninth Circuit incorrectly ruled that Arizona's plan discriminated on its face against female life annuitants because monthly payments to them were less than those made to equivalent male employees.[15]

III. ARIZONA'S PLAN WAS ALSO PERMISSIBLE BECAUSE THE LIFE ANNUITY PAYOUTS WERE BASED UPON FACTORS "OTHER THAN SEX"

Title VII incorporates the affirmative defenses of the Equal Pay Act and authorizes employers to differentiate in compensation between similarly situated male and female employees as long as the differential is based upon "other factors other than sex." *County of Washington v. Gunther*, 101 S. Ct. at 2248. In light of the previous discussion, it is readily apparent that a "factor other than sex" was relied upon to establish the annuity tables in this case. Like the disability insurance insurance program in *Geduldig v. Aiello*, the Arizona life annuity program was designed "to function essentially in accordance with insurance concepts." 417 U.S. at 492. The payment schedule here is directly related to insurance industry ac-

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[15] Because female annuitants did not receive a different benefit than male annuitants, there can be no merit to the Respondents' contention that the plan had a disparate impact on female participants. See Respondents' Brief in Opposition to Petition for Writ of Certiorari, at 5.

tuarial estimates that have not been challenged as inaccurate or intentionally discriminatory against females. The plan, moreover, "is thus structured in terms of the level of benefits and the risks insured to maintain the solvency of the [plan]." *Id.*

As in *Peters v. Wayne State University*, the annuity payment amount "differentiates between women and men *on the basis of longevity solely*." 29 FEP Cases at 1757. Thus, the *Peters* decision stated:

> Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas* [*v. Green*, 411 U.S. 792, 806 (1973)] quoting *Griggs* [v. *Duke Power Co.*, 401 U.S. 424, 431 (1971)]. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

29 FEP Cases at 1757. As the longevity factor was 'reasonabl[e] in light of the employer's stated [business] purpose" [16] it constitutes a factor other than sex authorized by Title VII and the Equal Pay Act.

For reasons not present here or in most deferred income or retirement annuity plans, the Court in *Manhart* questioned the employer's defense that its program was based upon the longevity of its employees. As previously noted, in *Manhart*, increased contributions were deducted directly each month from each female employee's take home pay. Thus, the *Manhart* plan "on its face, discriminated against every individual woman employed by the Department." 435 U.S. at 716. It "distinguished only imperfectly between long-lived and short-lived employees,

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[16] *Kouba v. Allstate Insurance Company*, 30 FEP Cases 57, 59 (9th Cir. 1982).

while distinguishing precisely between male and female employees." 435 U.S. at 713 n.24. The longevity of individuals was completely disregarded. Instead of giving similarly situated male and female employees an equivalent present actuarial value of a future annuity, the *Manhart* plan distinguished precisely and categorically between male and female employees.

Manhart, however, indicated that retirement payments based on "longevity" would be permissible, as employees with longer lives would receive more money than comparable employees with short lives. Although the longevity-related plan would "distinguish in a crude way between male and female pensioners, because of the difference in their average life spans," the Court noted that "[i]t is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize." 435 U.S. at 713 n.24. By reversing the Ninth Circuit and holding in this case that Arizona's plan did not violate Title VII, the Court would avoid disrupting mortality tables that are almost universally used in life annuity programs and relieve employers of the dilemma of being "damned in the discrimination context no matter what [they do]." *Manhart*, 435 U.S. at 721 n.38.

CONCLUSION

For the reasons stated, the decision of the Ninth Circuit below should be reversed.

Respectfully submitted,

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CASE NO. 82-52

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE, etc., et. al.,

Petitioners,

vs.

NATALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA

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CASE NO. 82-52

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NATALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA

INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE

For many years the State of Florida has operated pension plans for various groups of public employees in the state. During 1970, membership in the pre-existing plans was closed, a new consolidated pension system, The Florida Retirement System, was legislatively mandated, and administration of the plans was consolidated under the Florida Department of Administration, Division of Retirement, an executive agency of the State of Florida. The present pension system, FRS, is created by Chapter 121, Florida Statutes, and is governed thereby, as well as by rules adopted by the Department of Administration, which are contained in Chapter 22B, Florida Administrative Code. Pertinent excerpts from the statutes and rules are set forth in the appendix.

Membership in FRS is mandatory for all employees of covered public employers. §121.051, FLA. STAT., (1981). The system is what is known generally as a defined benefit plan. Members receive a fixed benefit, or set of benefit options. The contributions necessary to fund the liability for those benefits are adjusted from time to time as the need to do so is indicated by periodic actuarial studies. Until 1975, both the employee and the employer made contributions to fund the pension system. The contribution rate required of employees was equal for both men and women.

In 1975, FRS became non-contributory. Contributions for public employees were eliminated and the total contribution obligation became that of the employing public agencies, to be paid from their operating budgets. §121.071, FLA. STAT. (1981). Thus, the plan was not perceived as being

at variance with the holding in City of Los Angeles, Department of Water and Power v. Manhart, (hereinafter "Manhart"), 435 US 702, 55 L. Ed. 2d 657, 92 S. Ct. 1370 (1978).

The membership in FRS is presently composed of nearly 400,000 active members (those who are currently employed by a covered public employer) and nearly 70,000 retired members drawing benefits.

The legislative creation and governance of FRS under Chapter 121 arose in part because of a need to impose actuarial soundness on public retirement systems. Indeed in 1976 an amendment to the State Constitution was ratified by the voters which constitutionally requires actuarial soundness in public retirement systems. Art. X, Sec. 14, FLA. CONSTITUTION (1968). Legislative oversight of FRS also mandates actuarial soundness. §§121.135, 121.192, FLA. STAT. (1981)

The public and legislative concern for the actuarial soundness of the public retirement systems was justified. The dramatic increase in contribution rates contained in §121.071, Florida Statutes,[1] was occasioned by a past service deficit of nearly four billion dollars in pre-existing pension systems for State employees. That debt is being amortized by increased contributions over a 30-year period ending in the year 2007 A.D.

1/ §121.071 Contributions.-
(2) Until January 1, 1975, each employer shall contribute an amount equal to the total of its member contributions, made under subsection (1), each pay period. Effective January 1, 1975, and until October 1, 1978, each employer shall contribute 9 percent of gross compensation each pay period for each of its regular members and 13 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1978, each employer shall contribute 9.1 percent of gross compensation each pay period for each of its regular members and 13.95 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1981, each employer shall contribute 10.93
(Footnote 1/ continued on p.5)

The benefit provisions of FRS which are of concern are set out in §121.091(6), Florida Statutes.[2]

The option offered by subparagraph 1 of §121.091(6)(a) is known as "Option 1". It is the option most often selected by employees retiring under the plan. Option 1 treats similarly situated men and women identically. Similarly situated males and females receive an equal monthly retirement

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1/ Continued

percent of gross compensation each pay period for each of its regular members and 13.91 percent of gross compensation each pay period for each of its special risk members.

2/ §121.091 Benefits payable under the system.

(6) Optional Forms of Retirement Benefits.

(a) A member shall elect, prior to the receipt of his first monthly retirement payment, to receive the retirement benefits to which he is entitled under subsection (1), subsection (2), or subsection (3) of this section in accordance with one of the following options:

1. The maximum retirement benefit payable to the member during his lifetime. (Footnote 2/ continued on p. 6)

benefit for the remainder of their lives.[3] The retirement plan is financed by predicting the amount of funds necessary at time of retirement to guarantee a member's benefit under Option 1.

2/ Continued

2. A decreased retirement benefit payable to the member during his lifetime and, in the event of his death within a period of 10 years after his retirement, the same monthly amount shall be payable for the balance of such 10 year period to his beneficiary or, in case the beneficiary is deceased, in accordance with subsection (8) of this section as though no beneficiary had been named.

3. A decreased retirement benefit which shall be payable during the joint lifetime of both the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in the same amount.

4. A decreased retirement benefit which shall be payable during the joint lifetime of the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in an amount equal to 66-2/3 percent of the amount which was payable during the joint lifetime of the member and his joint annuitant.

3/ Option 1 is a benefit payable for the life of the retiring member. It is calculated as follows. The employee's Average Final Compensation is determined. AFC is the average (Footnote 3/ continued on p.7)

As the Court noted in Manhart, it is undeniably true that women, as a class, outlive men, as a class.[4] In prognosticating the contributions needed to keep FRS actuarially sound, it is therefore necessary to take that fact into account and to reflect it in the financial planning for the system.[5]

3/ Continued

of the 5 most highly paid years of the employee's career. Next, the number of years of creditable service, as defined in the plan, is multiplied by a factor, which varies with the retirement category but which is the same for men and women in each category. That results in a percentage which is then multiplied by the retiree's AFC to determine the yearly retirement benefit and divided by 12 to arrive at the monthly benefit. To illustrate, if a man and a woman were retiring at normal retirement age and each had 20 years of service in the regular membership category and an average final compensation of $10,000, their retirement benefits would be calculated thusly:

1. 20 years x 1.60% - 32%
2. 32% x $10,000(AFC) = $3,200
3. 3200 ÷ 12 = $266.67 (monthly benefit)

Each member, male or female, would receive the same benefit for his or her life.

4/ 98 S. Ct. 1370 at 1375.

5/ 98 S. Ct. 1380 at 1380.

For example, if a male member retires at age 66, with an Option 1 benefit entitlement of $10,000 per year, statistical experience shows that the system will require $94,000 to provide the benefit for his life. However, a female retiree in the same circumstances will require the system to expend $111,600, or 18.9% more, to pay her the same benefit for life. Those historical experiences are calculated and considered in setting the contribution rates exacted from employers to keep the system actuarially sound.

Although the FRS is funded based upon Option 1, employees may voluntarily elect Options 2, 3, or 4. Those options are survivorship options. A member may select one of them, based upon the member's own experience and judgment as to whether the spouse will survive and require financial support. Florida law requires, for the soundness of the system, that Options 2, 3, and 4 be the actuarial equivalent of the member's Option 1 benefit.

§121.091(6)(b), FLA. STAT. (1981). The State Retirement Administrator is required to adopt tables of actuarial factors necessary to reach actuarial equivalence. Historically, and today, in conformity with insurance practices, those tables are based on sex-distinct mortality rates.

As a result, males selecting one of the elective survivorship options, receive a smaller monthly benefit. That occurs because the system must predict the probability that the spouse will survive the retired employee and continue to draw benefits. The probability of a male's spouse surviving him is greater than the probability of a female's spouse surviving her, and the survivorship tables take that actuarial fact into account.

Thus, the FRS plan has a number of similarities to this case and the State of Florida is vitally interested in the issues before the Court. Although the case under review involves a contributory optional plan

to defer compensation for tax considerations, Arizona finds itself in much the same situation as Florida: an employee benefit plan which provides no difference in contributions between male and female employees and which provides for equal monthly benefit options to similarly situated male and female employees is nevertheless suddenly vulnerable under Title VII of the Civil Rights Act of 1964 because of the decision by the Ninth Circuit in this case that each and every elective option in a plan must be based on other than sex-distinct actuarial tables.

SUMMARY OF ARGUMENT

Although the Manhart holding was limited to the situation in which an employer-operated pension required unequal employee contributions to the plan, ensuing decisions have extended the Manhart rationale to prohibit employer-operated plans from distributing

unequal benefits to male and female employees based upon sex-distinct actuarial tables. However, not until the instant case has a reported decision struck down a plan which (1) does not exact unequal contributions, (2) provides pay-out options identical for both males and females and (3) provides other purely voluntary options which are based upon sex-distinct actuarial factors. Not until now have the courts held that no option in an employer's plan may take into account historical statistical data on sex-differentiated mortality rates even though participation in such an option is a matter of voluntary choice by the member and even though the plan offers benefit options which treat individual members identically regardless of their sex.

The decision below is wrong and should be reversed for a number of reasons. Firstly, decisions prior to this case dealt with cases where a female employee received less

in periodic benefits and was required to accept that disparity. In this case, and under State of Florida's retirement system, the employee is not faced with that choice. Rather employees are provided an option which treats them equally. Under both Arizona's deferred compensation plan and Florida's pension system, employees may voluntarily select among other options. It is true that benefits under some options are based upon class-wide knowledge about differences in male and female mortality rates, but it must be emphasized that an employee will select such an option only if he or she agrees with the proposition that the class-wide prediction of life-expectancy based upon sex-distinct data matches his or her individual predictions. That does not constitute an imposed assumption, but rather a belief on the part of the selecting retiree. The provisions of Title VII should not be extended to prohibit the inclusion of purely

voluntary options in a retirement plan which take into account sex-distinct actuarial data where the employer does not otherwise make sex-based distinctions and where the employer provides equal benefit provisions. The inclusion of such voluntary options is in no sense imposed discrimination against an individual employee. Rather, such options allow flexibility in an employee's decisionmaking. To hold that such voluntary options violate Title VII would result in the removal of that flexibility.

ARGUMENT

1. An employee pension or deferred compensation plan does not discriminate based on sex when the plan does not require unequal contributions and when the plan offers a range of options, some of which provide equal payments and some of which do not, but the decision to select an option is purely voluntary.

Manhart involved a case where all female employees were required to make contributions to a retirement plan in greater

amounts than males, based upon sex-distinct mortality tables. As a result, while females were working, they received smaller pay checks because of the sex-based tables. Yet there was no assurance that a given female would live as long as the mortality tables indicated and collect the greater pension amounts predicted by the tables. Since Manhart, a number of cases have extended its reasoning and have held that providing unequal benefits based upon sex-distinct mortality tables violates Title VII. However, except for the decision under review, those holdings dealt with cases in which employees had no choice but to accept differing benefit payments. Equal Employment Opportunity Commission v. Colby College, 589 F. 2d 1139 (1st Cir. 1978), involved a plan which required participation and offered only annuities based on sex-distinct mortality tables, so that women were forced to accept smaller monthly retirement benefits. Women In City Government

United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981), concerned another compulsory retirement system which exacted higher contributions from females and which paid lower monthly benefits to women without any choice on their part. Sprit v. Teachers Ins. and Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979), likewise involved a pension plan which forced unequal monthly retirement benefits upon women, although contributions were equal.

There is a significant and compelling difference between the pension plans in those cases, on the one hand, and the deferred annuity program offered by Arizona and the State of Florida pension system, on the other. That difference was overlooked by the Ninth Circuit in its decision.[6] Under the Arizona deferred compensation plan and under Florida's pension system, unequal contributions are not

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6/ Norris v. Arizona Governing Committee, 671 F. 2d 330 (9th Cir. 1982)

required. Under Arizona's plan, employees decide how much of their pay they wish to defer for tax purposes. Under Florida's pension plan, contributions for all employees are equal, and, since 1975, have been paid entirely by the employer. Both plans provide a number of options among which an employee may voluntarily choose. Some of those options provide for equal payments for similarly situated males and females. Other options provide differing annuity payments based upon mortality expectations which are sex-distinct.[7]

7/ Arizona's plan offers all employees a lump-sum payment option and a time-certain periodic payment option, which produces identical benefit payments for employees. The plan's annuity options produce lower monthly benefits to females. FRS provides equal lifetime monthly benefits to similarly situated males and females. If, however, an employee decides to choose a joint annuitant or survivorship option, the life expectancy of the employee's spouse, based upon the spouse's sex, is taken into account in determining the amount of monthly benefits.

Thus, unlike Manhart, where females had no choice, the Florida pension system does not impose sex-based discrimination on any male or female employee. Decisions of this Court indicate that the ability to make a choice which avoids gender-based classification precludes a finding of discrimination. Compare Parham v. Hughes, 441 US 347 (1979), with Caban v. Mohammed, 441 US 380 (1979).

The Florida pension plan does not impose stereotyped assumptions at all. It offers the Option 1 benefit, which is the highest amount an employee will receive, and which is the same for men and women employees.

All other options are survivorship options. They provide an income for the life of the employee and his spouse. In those options, Florida's plan takes into account the necessity to predict as accurately as possible the expected life of the spouse.

There is little dispute that the stratification of mortality statistics by sex yields a more accurate prediction of life expectancy in an individual case than does the use of unstratified data. See Benston, The Economics of Gender Discrimination Revisited, 49 University of Chicago L.Rev. 489, 499-500, 524. Under Florida's plan, the maximum lifetime benefit to any employee is that provided by Option 1 - an equal payment for life to similarly situated men and women. Hence, a choice by an employee to select a survivorship option is necessarily based on the employees' own assessment that his or her spouse will survive him. The employee who chooses a survivorship option does so because of his concurrence with the predictions shown by gender-based mortality data. If an employee does not concur with that assessment, if he believes otherwise, he will rationally take Option 1, which is the maximum retirement

benefit.

It is submitted that a plan which does not force unequal benefits on an employee because of the individual's sex, but which allows the employee to accept or reject, believe or disbelieve, the predictions of life expectancy concerning his spouse in deciding on a distribution of retirement benefits does not discriminate at all under 42 USC §2000e-2 as construed in Manhart. Each employee, male or female, may accept or reject the sex-distinct prediction about the life expectancy of the spouse in their individual cases and voluntarily select an option accordingly. See Equal Opportunity Employment Commission v. Colby College, 589 F. 2d 1139, 1146 (1st Cir. 1978)(Coffin, C.J., concurring).

2. The Ninth Circuit's holding that no plan may offer even a voluntary option which pays benefits to an employee based on gender-distinct mortality rates will result in removing any flexibility for individual employees in their financial planning.

The Court should be aware that if the Ninth Circuit's holding in Norris is upheld, the result will be loss of flexibility in financial planning for members of plans such as Florida's, with no long-term benefit to either males or females. Should the Norris decision stand unaltered, Florida would have two fiscally responsible alternatives in bringing its plan into compliance with such a standard.

Florida could repeal those portions of Chapter 121, Florida Statutes, which provide survivorship options to its public employees. That would leave only Option 1 available to members, which would certainly satisfy the requirements of Title VII as construed in Norris. It would mean, however, that future retirees would have no ability to provide survivorship annuities to their spouses under the plan.

Another solution would be to construct a "unisex" mortality table for the survivor-

ship options. The actuarially sound method for doing so would be to merge the existing gender-based actuarial factors by use of a weighted averaging method. The long-term result of doing so would be an eventual return to the lower mortality factors presently used for males under the survivorship options, because of the principle of adverse selection.

Consider for illustration one set of actuarial factors now in use under FRS for the survivorship options:

Male 66 with female spouse 64 - .71218

Female 66 with male spouse 64 - .86854

To develop a unisex factor for that age combination, the existing factors would be averaged by the following process. The proportions of males and females historically selecting the survivorship options are calculated, those proportions are

multiplied by the existing male and female factors respectively, and the resulting products are added to arrive at a "unisex" factor thusly:

.85 (the male percentage of retirees selecting survivor options) X .71218 (present male factors) + .15 (the female percentage of retirees selecting survivor options) X .86854 (present female factor) = .73563 (unisex factor).

The resulting factor is greater than the present male factor and less than the current female factor, but lies closer to the male factor, since men tend to be older than their spouses and since they tend to select a survivorship option more often.

If a "unisex" table were adopted, females would rationally select survivorship options less often than they do now. Females presently select survivorship options far less than males, although the sex-differentiated tables provide for less of

a reduction than that for males. The only explanation for that phenomenon is that females who retire are individually judging that they will, indeed, survive their male spouses. Under a "unisex" table, females would experience an even greater reduction than that presently required. Therefore, over time, fewer and fewer females could be expected to take a survivorship option. The population of those selecting a survivorship option would become increasingly male. And, as it does, periodic adjustments in the "unisex" rate will be skewed more and more toward the present male actuarial factor. Eventually, the "unisex" tables would yield factors very close to the values of present male factors in sex-distinct tables. Males would not receive higher monthly benefits in the long run and females would be forced out of survivorship options because of the unrealistically high cost of taking such options in relation to

their own individual judgments that they can expect to outlive their spouses.

The irony is that such a result would not occur because females or males would be forced to make stereotyped assumptions about their spouses' life expectances in relation to their own - the unisex table would remove any such assumption from their planning decisions. It would occur because individual females know that they can expect to live longer than their spouses, individual males know that they can expect to live shorter lives, and individuals act according to that knowledge.

While Title VII may prevent an employer from forcing upon individual employees a generalized but valid prediction about life-expectancy associated with gender, it does not follow that an employer is guilty of discrimination because he provides options which do not require acceptance of the prediction and also allows employees to select

options which do. In such a case, it is not the employer, but rather the employee who is determining that the "stereotyped" assumption applies to his or her individual case.

In short, it is not a violation of 42 USC §2000e-2 for an employer to allow each individual employee to make decisions based upon stereotyped generalizations of life expectancy. Norris holds otherwise and should be reversed. If not, the result will be imposed rigidity and curtailment of financial planning options for retirees with no concomitant benefits.

CONCLUSION

The State of Florida urges the Court to reverse the decision of the Ninth Circuit in Norris v. Arizona Governing Committee and to do so on the ground that Title VII does not prohibit an employer from offering annuity options to its employees which are

based upon sex-distinct mortality tables, so long as the plan does not exact unequal contributions from employees based on such tables and so long as the plan offers retirement options which provide equal benefits to males and females.

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EXCERPTS OF PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

42 USC §2000e-2

§2000e-2. Unlawful employment practices
(a) It shall be an unlawful employment practice for an employer-
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

ART. X, Sec. 14, Florida Constitution (1968)

SECTION 14. State retirement systems benefit changes.-A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

FLORIDA STATUTES (1981)

§121.051(1)(a):
The provisions of this law shall be compulsory as to all officers and employees, except legislators who meet the requirements of s. 121.052(1)(c), who are employed

on or after December 1, 1970, of an employer other than those referred to in paragraph (2)(b), and each officer or employee, as a condition of employment, shall become a member of the system as of his date of employment, except that a person who is retired from any state retirement system and is re-employed on or after December 1, 1970, shall not be permitted to renew his membership in any state retirement system except as provided in s. 121.091(4)(e), for a person who recovers from disability, and s. 121.091(9)(d), for a person who is elected to public office. Officers and employees of the University Athletic Association, Inc., a nonprofit association connected with the University of Florida, employed on and after July 1, 1979, shall not participate in any state-supported retirement system.

§121.071(1), (2), (3):
(1) Until January 1, 1975, regular members shall contribute each pay period at the rate of 4 percent of gross compensation and special risk members shall contribute each pay period at the rate of 8 percent of gross compensation. Effective January 1, 1975, regular members and special risk members shall make no contribution to the system.
(2) Until January 1, 1975, each employer shall contribute an amount equal to the total of its member contributions, made under subsection (1), each pay period. Effective January 1, 1975, and until October 1, 1978, each employer shall contribute 9 percent of gross compensation each pay period for each of its regular members and 13 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1978, each employer shall contribute 9.1 percent of gross compensation each pay period for each of its regular members and 13.95

percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1981, each employer shall contribute 10.93 percent of gross compensation each pay period for each of its regular members and 13.91 percent of gross compensation each pay period for each of its special risk members.
(3)(a) Effective January 1, 1975, each employer shall accomplish the increased contribution required by subsection (2) by a procedure in which no employee's gross salary shall be reduced.

§121.091(6):
(a) A member shall elect, prior to the receipt of his first monthly retirement payment, to receive the retirement benefits to which he is entitled under subsection (1), subsection (2), or subsection (3) of this section in accordance with one of the following options:
1. The maximum retirement benefit payable to the member during his lifetime.
2. A decreased retirement benefit payable to the member during his lifetime and, in the event of his death within a period of 10 years after his retirement, the same monthly amount shall be payable for the balance of such 10-year period to his beneficiary or, in case the beneficiary is deceased, in accordance with subsection (8) of this section as though no beneficiary had been named.
3. A decreased retirement benefit which shall be payable during the joint lifetime of both the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in the same amount.
4. A decreased retirement benefit which shall be payable during the joint lifetime of the member and his joint annuitant and

which shall continue after the death of either during the lifetime of the survivor in an amount equal to 66-2/3 percent of the amount which was payable during the joint lifetime of the member and his joint annuitant.

(b) The benefit payable under any option stated above shall be the actuarial equivalent, based on tables adopted by the administrator for this purpose, of the amount to which the member was otherwise entitled.

§121.135:

(1) Commencing in the year 1980, and every third year thereafter, the Division of Retirement of the Department of Administration shall make a report to the Legislature regarding the actuarial conditions of locally administered retirement plans or systems operated by the political subdivisions of the state and the compliance of such retirement plans or systems with the provisions of this act.

(2) The Department of Administration, through its Division of Retirement, shall make to each regular session of the Legislature a written report on the operation and condition of the state-administered retirement systems.

§121.192(2):

State retirement actuary.-The Division of Retirement may employ an actuary, as defined in s. 121.021(6). Such actuary shall, together with such other duties as the director of retirement may assign him, be responsible for:

(1) * * *

(2) Making periodic valuations of the retirement systems.

* * *

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No. 82-52

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,
Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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OCTOBER TERM, 1982

No. 82-52

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The Lawyers' Committee for Civil Rights Under Law and the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully submit this *amici* brief in support of the respondents, with the written consent of all parties. The parties' consents have been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law was founded in 1963, at the request of the President of the United States, to help secure the civil rights of all

Americans through the prosecution of civil rights cases and by other means. Over the past 19 years, the Committee has enlisted the services of thousands of members of the private bar across the country in addressing the legal problems caused by discrimination and by poverty.

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation whose principal purpose is to secure the civil and constitutional rights of minorities through litigation and education. For more than forty years, its attorneys have represented parties in thousands of civil rights cases, including many significant cases before this Court and the lower courts.

The Committee and the Fund have participated, either as counsel for a civil rights plaintiff or as *amicus*, in a number of decisions of this Court construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* These include *Connecticut v. Teal*, —— U.S. ——, 73 L.Ed.2d 130 (1982); *General Telephone Co. of the Southwest v. Falcon*, —— U.S. ——, 72 L.Ed.2d 740 (1982); *County of Washington v. Gunther*, 452 U.S. 161 (1981); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), and other cases.

SUMMARY OF ARGUMENT

I.

A. This case is squarely controlled by the decision in *Los Angeles Department of Water & Power v. Manhart*, which considered and rejected many of the arguments advanced by the petitioners and their *amici*. In *Manhart*,

the employer sought to justify a pension plan requiring higher contributions from women than from men for monthly benefits equal to those of male employees retiring at the same age; this Court rejected the contention that the plan did not violate Title VII of the 1964 Civil Rights Act because the value of the pensions and contributions were "actuarially equal." So, in this case, Title VII proscribes use of a plan based on equal contributions by men and women but affording smaller monthly benefits upon retirement to women.

Manhart also involved the employer's claim that unisex contributions and benefits would lead to adverse selection out of the pension scheme by males and the ultimate destruction of the plan. It is as clear in this case as it was in *Manhart* that there is no record evidence supporting this contention, and that adverse selection on the scale predicted by petitioners' *amici* is highly unlikely. Moreover, materials in this record and facts judicially noticeable demonstrate the extent to which the life annuity plans at issue were based upon the sex of employees, rather than upon an accurate measure of expected longevity.

Indeed, the sex-based tables at issue here do not even deal fairly with women as a class, compared with men as a class. By substantially overstating the average sexual differences in life expectancy at the relevant ages, they require women as a class to subsidize the benefits of men as a class.

B. The Arizona plan cannot be saved from condemnation under Title VII by the "open market" exception of *Manhart*. Arizona did far more than passively make available accumulated contributions to retiring employees who purchased their own life annuities on the open market; it affirmatively limited the choices available to its employees to include only life annuities based on discriminatory, sex-based mortality tables. Nor can it be said that Arizona gave its employees a selection of payout op-

tions, including life annuity plans, which fairly reflected the "open market." The State simply failed to establish on this record that it was unable to contract for unisex annuities, and *amici's* own research indicates that such plans are available and in use today. Moreover, the Lincoln National Life Insurance Company—one of the companies used in Arizona's plan—has informed *amici* that it is willing to provide group life annuities on a unisex basis to employers offering it a substantial amount of business.

II.

Because *Manhart* explicitly put employers on notice that sex-based pension plans violated Title VII, the considerations which led this Court to withhold retroactive monetary relief in that case are not present, and such relief was properly awarded below.

ARGUMENT

I. THE PRESENT CASE IS CONTROLLED BY THIS COURT'S DECISION IN *LOS ANGELES DEPARTMENT OF WATER & POWER v. MANHART*, FROM WHICH IT IS NEITHER FACTUALLY NOR LEGALLY DISTINGUISHABLE.

A. Most of the arguments made by petitioners and their *amici* were considered and rejected in *Manhart*, and no persuasive justification for abandoning that ruling is advanced in this case.

Despite the voluminous and repetitive briefs submitted by petitioners and *amici*, the present case cannot persuasively be distinguished from this Court's recent ruling in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). In that case the Court held that a municipal employer's mandatory pension plan which required higher pay-period contributions from female employees than from male employees, although paying equal monthly benefits upon retirement, constituted discrimination in compensation on the basis of sex which

violated Title VII of the 1964 Civil Rights Act. This conclusion followed, the Court's opinion states, despite the actuarial validity of the generalization that women employees, as a group, could be expected to draw monthly pension benefits for a longer period of time than male employees, as a group, if both retired at the same age.

1. *"Equal Actuarial Value".*

As if *Manhart* had never been decided, petitioners and their *amici* urge strenuously that Arizona's pension plan —which makes available to its male and female employees an annuity option requiring equal pay-period contributions but affording women retirees smaller monthly benefits than men who retire at the same age—is nondiscriminatory because the present actuarial value of the promise to pay an annuity is equal for men and women (based on the longer life expectancy of women as a group). Thus, if petitioners are correct, *Manhart*'s interpretation of Title VII as proscribing unequal contributions for equal monthly benefits based on sex does not reach a plan which requires equal contributions for unequal monthly benefits based on sex. Nothing in *Manhart* suggests that the Court's holding was so cramped.

Indeed, the "equal actuarial value" argument was advanced in *Manhart*:

> In essence, the Department is arguing that the prima facie showing of discrimination based on evidence of different contributions for the respective sexes is rebutted by its demonstration that there is a like difference in the cost of providing benefits *for the respective classes.*

435 U.S. at 716 (emphasis added). Los Angeles suggested that eliminating this "equal actuarial value" would result in unfair "subsidization" of women's pensions by men:

> . . . unless women as a class are assessed an extra charge, they will be subsidized, to some extent, by

> the class of male employees. It follows, according to the Department, that fairness to its class of male employees justifies the extra assessment against all of its female employees.

Id. at 708-09 (footnote omitted). But *Manhart* rejected these claims based on reasoning which is fully applicable to the case at bar:

> But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. *Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex.* But a statute that was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification.

Id. at 709 (emphasis added and citation and footnotes omitted).

Manhart's rejection of an "equal actuarial value" claim was reinforced last Term by this Court's decision in *Connecticut v. Teal*, —— U.S. ——, 73 L. Ed. 2d 130 (1982), which made clear that fairness to a class of persons defined according to race, sex or national origin characteristics cannot justify unfairness to an individual within such a group. There, Connecticut sought to avoid judicial scrutiny for job-relatedness of a written test by pointing to the "bottom line" results of its promotion practices, even though the examination barred many more minority than non-minority applicants from further consideration for promotion. Here, Arizona and its *amici* suggest that lower monthly pension benefits for women should be insulated from judicial scrutiny because the present actuarial value of the annuity option to incumbent female employees is the same as the present actuarial value of the option to incumbent males. The argument is

nothing more nor less than an appeal to the "bottom line" concept rejected by the Court in *Teal*.[1]

2. *Adverse Selection.*

The *amici* in support of petitioners have based much of their concern over this case on the possibility that men would disproportionately elect to take a lump-sum option, rather than a unisex life annuity option that paid them less than their lump sum could command on the open market by purchasing a male life annuity with the lump sum proceeds. The consequence of this anticipated phenomenon, say petitioners' *amici*, would be the withdrawal of men from payroll-deduction life annuity plans and the destruction of the retirement life annuity market as it now exists. If this spectre is laid to rest, much of the force of the arguments made by those *amici* disappears; indeed, the brief of the American Academy of Actuaries ("Academy") admits this expressly at p. 11.

There are two important points to be made about these arguments. First, the parade of horribles leading from "adverse selection" to destruction of the life annuity market is just as much hypothetical and unproven on this record as it was when the same consequences were predicted in *Manhart*. Second, there are available judicially noticeable facts which suggest how highly unlikely it is that these consequences will flow from an affirmance of the judgment below.

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[1] In fact, the situation in *Teal* could be expressed in actuarial terms. Under the facts of that case, black applicants for promotion to the positions at issue had at least as good a chance of ultimate selection as white applicants. If an actuary were to calculate the average chances of selection for each race, one could then speak of the "actuarial value" or "present value" of each black applicant's chance of selection as being the equivalent of the "actuarial value" or "present value" of each white applicant's chance of selection. Focusing on their chances at the outset of the promotion process would produce precisely the analysis which is urged with respect to the case at bar by the American Council of Life Insurance ("Council"). Council brief at pp. 8; 12-14.

In *Manhart*, some of the same *amici* predicted widespread "adverse selection" by males out of the pension plan in question if women employees made equal contributions. 435 U.S. at 716 n.30. But, this Court noted, "there ha[d] been no showing that sex distinctions [in contributions] are reasonably necessary to the normal operation of the Department's retirement plan [to avoid these consequences]." *Id.* Similarly, there is no evidence on this record concerning the extent to which any adverse selection by men would be reasonably likely to occur if Arizona chooses to contract for life annuities offering equal monthly benefits, and requiring equal monthly contributions, for men and women. The briefs of petitioners' *amici* do not contain very much specific data.[2] Hence, *Manhart* is controlling and requires rejection of the claim that fear of adverse selection justifies the discriminatory pay-out to women.

Moreover, it seems self-evident from materials available to the Court and subject to judicial notice that a male employee would have to be extremely foolish to decide to spend more in taxes to get his lump-sum payment and an individual male life annuity than he would gain in the size of his annuity payments.

For the sake of simplicity, let us hypothesize John Doe, an unmarried male retiree with an adjusted age of 65 at the time of retirement. John Doe has $10,000 in taxable income the year of his retirement, in addition to his deferred compensation benefits in whatever form he decides to take them. He has seen the State's description of how the plan works, Exhibit 10, p. 5, to the Joint Stipulated Statement of Facts, and has decided to follow the

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[2] The fact that Arizona decided to stop offering life annuities to its employees after the decision below, Pet.Br. at 7, is not probative of the effect an affirmance of the Ninth Circuit would have on other employers. "Such actions in the face of litigation are equivocal in purpose, motive and permanence." *Jenkins v. United Gas Corporation*, 400 F.2d 28, 33 (5th Cir., 1968) (footnote omitted).

example there stated, of deferring $1,200 in earnings a year for 30 years, invested at a 10% growth rate. He has $200,897 available at retirement. (*Id.*).

If he takes a life annuity with the Lincoln National Life Insurance Company, Exhibit 3, second p. 6, to the Joint Stipulation tells him that he would get a life annuity of $7.02 per month for each $1,000 he invests based on the sexually disparate male table.[3] A unisex value would be somewhere between the male monthly payment of $7.02 and the female monthly payment of $6.18 for each $1,000 invested, a maximum difference of 84 cents. Use of a unisex table could not possibly produce a monthly payment less than $1,241.54.[4]

If John Doe were to take his $200,897 as a lump sum, pay taxes on it and invest the remainder in an annuity at the male rate of $7.02 for each thousand dollars invested, he would do significantly worse. At the 1982 tax rates set forth in 26 U.S.C.A. § 1(c)(1) (Supp. 1982), the incremental tax on John Doe's lump-sum payment would be $95,534,[5] leaving only $105,363 available for the purchase of an annuity at male rates on the open market. At the $7.02 rate this would buy a male life annuity with a monthly benefit of $739.65.[6]

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[3] This figure is for a straight life annuity, with no number of months' payments guaranteed, for the sake of simplicity.

[4] The product of $6.18 and 200.897 thousand-dollar units is $1,241.54.

[5] Federal income tax on a taxable income of $10,000 would be $1,233 with a marginal rate of 19%. Federal income tax on a taxable income of $210,897 would be $96,767 with a marginal rate of 50%. Subtracting one figure from the other produces the fact that the tax on the lump-sum payment would be $95,534. This does not take the possibility of income averaging into account, nor does it take the effect of State taxes into account. See note 7 *infra*.

[6] The product of $7.02 and 105.363 thousand-dollar units is $739.65.

In table form, John Doe's choices are as follows:

Maximum possible loss from a unisex table, if adverse selection by males is 100% and unisex rates are the same as current rates for women (84¢ per thousand dollars invested, with an investment of $200,897)	$168.75/month less than a male table would produce [7]
Cost of taking his lump-sum payment, paying his taxes, and buying a male annuity on the open market ($1,241.54/month less $739.65 a month)	$501.89/month less than a unisex table would produce

Adverse selection by male retirees is extremely unlikely under these facts. While the tax costs of taking the lump sum will vary from individual to individual, they will clearly be substantial. Because adverse selection is unlikely, the unisex rates are likely to be substantially more favorable than the present rates for women, and the $168.75 figure in the above table would likely be considerably smaller.

Finally, any contention that males would take annuities for fixed periods of years because they are aware of their shorter life spans, and thus that a significant danger of adverse selection remains even though the lump-sum option is ruled out as a practical source of adverse selection, would require very specific factual showings, based on the experience of insurers, which are completely absent from this record. The contention assumes that most men are

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[7] If income averaging were taken into account, assuming $15,000 in taxable income in each of the previous four years, our rough calculation is that the additional Federal income tax on the lump sum would still exceed $80,000. A tax cost of $80,000 would leave John Doe with $120,897 to invest at the male rate of $7.02 per thousand dollars invested. His monthly payment would be $848.70, a figure which is $392.84 a month *less* than he would get from use of the unisex table.

willing to bet that they will die early; this flies in the face of common understanding, just as it ignores the potentially strong influence of the fear of outliving one's resources. The absence of record evidence, tested by cross-examination, on such a doubtful contention underscores the problems with the threadbare record on the defenses asserted in this case.

3. *The Accuracy of the Sexually Disparate Tables in Measuring Longevity.*

Closely related to the "actuarial value" argument is the claim, made here and in *Manhart*, that because single-sex mortality tables reflect real differences in longevity between women and men, as a group, unequal life annuity monthly benefits based upon such tables do not amount to differences in compensation based on sex. *Manhart*, of course, flatly rejected this contention:

> The Department's argument is specious because its contribution schedule distinguished only imperfectly between long-lived and short-lived employees, while distinguishing precisely between male and female employees. In contrast, an entirely gender-neutral system of contributions and benefits would result in differing retirement benefits precisely "based on" longevity, for retirees with long lives would always receive more money than comparable employees with short lives. Such a plan would also distinguish in a crude way between male and female pensioners, because of the difference in their average life spans. It is this sort of disparity—and not an explicitly gender-based differential—that the Equal Pay Act intended to authorize.

435 U.S. at 713 n.24.

Even if it were lawful to treat women as a class rather than individually, any employer seeking to justify the use of sexually disparate annuity benefits on the basis of greater longevity for women as a class than for men as a class would still have the burden of proving that its particular sexual disparities were in fact an accurate reflec-

tion of such greater longevity for women as a class. Otherwise, as the National Association of Insurance Commissioners points out, an inaccurate set-back figure would enable insurance companies to earn profits from unfair discrimination. Insurance Commissioners' brief at 25.[8]

The briefs filed by various *amici* in support of petitioners carry the implication that the sexually disparate mortality tables used by the insurance industry are based on scientific measurements. From the information before this Court, and from Census Bureau information which can properly be the subject of judicial notice, such an implication would not be correct.

None of the mortality tables used for life annuity benefits under the Arizona plan contains any separate figures for female mortality. See the exhibits to the Joint Stipulated Statement of Facts.[9] All of them use male mortality figures, and set women back a number of years which appears to be arbitrary. Thus, a male will receive annuity benefits based on his actual adjusted age at retirement, but a woman will receive annuity benefits based on a male's benefits as if the male had retired at an age a constant number of years younger than the woman's actual adjusted age. "Thus a 65 year old woman is treated as being 59 years old and her monthly annuity based on that age, while a 65 year old male has his monthly annuity based on age 65." JA 12. In the insurance industry generally, the amount of the setback varies from plan to plan, and is commonly greater for annuities

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[8] While the Council argues that respondents never challenged the accuracy of the tables used, Council brief at 12 n.2, Arizona was the party attempting to justify an explicit sexual classification and it therefore had the burden of proving the accuracy of the tables used in its plan.

[9] The stipulation describes the Lincoln National LIC plan as containing a separate table for women, JA 12, but exhibit 3 uses only a male table with a setback for women. Perhaps there was an earlier Lincoln National LIC plan.

(where the setback harms women) than for life insurance (where the setback helps women). The following table shows the differences in this supposedly "scientific" assessment of mortality:

Plan	Amount of Setback for Women on Male Mortality Tables	Source of Information
Usual annuity plan (setback harms women by giving them lower monthly benefits)	6 years	*Amicus* brief of National Ass'n of Insurance Commissioners at 25
National Investor	6 years	JA 12
National Investors LIC (presumably a different policy than the one described in the stipulation)	5 years	Exhibit 4, at the pages marked GA-AA in the lower right corner
ITT LIC	5 years	Exhibit 7, p. 8
Hartford Variable Annuity LIC	4 years	Exhibit 6R, p. 10
Lincoln National LIC	4 years	Exhibit 3, second p. 6
Variable Annuity LIC	4 years	Exhibit 5, p. 5
Usual life insurance plans (setback favors women by charging them lower rates)[10]	3 years	*Amicus* brief of National Ass'n of Insurance Commissioners at 25.

To make matters worse, the U.S. Census Bureau's tables for "Expectation of Life at Single Years of Age"

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[10] The fact that life insurance has only a three-year setback for women while annuities commonly utilize a much larger setback is of particular interest, because life insurance is commonly purchased during the earlier periods of life when the male/female differences in life expectancy are greater, and annuities are commonly purchased during the later periods of life when the male/female differences in life expectancy are smallest. (See the table below). Under a nondiscriminatory system, one would expect to see a larger life insurance setback resulting in lower premiums for women, and a smaller annuity setback resulting in lesser reductions in monthly benefits: in short, one would expect to see the reverse of the present system.

make clear that female mortality cannot be set accurately at a constant number of years below male mortality. Sexual differences in longevity decrease substantially over time, and using an average difference in longevity which is accurate for one age will greatly overstate the average differences in longevity at a later age. The following table shows the differences in longevity at various ages for men as a class, compared with women as a class, for 1973 (close to Arizona's adoption of its plan) and for 1978 (the most recent table published): [11]

	Sexual Differences in Life Expectancy at the Ages Stated (Female Life Expectancy Minus Male Life Expectancy)	
Years of Age	1973 Data	1978 Data
25	6.9 years	7.0 years
30	6.6 years	6.6 years
35	6.4 years	6.5 years
40	6.2 years	6.3 years
45	6.0 years	6.1 years
50	5.7 years	5.9 years
55	5.3 years	5.5 years
60	4.7 years	5.0 years
65	4.1 years	4.4 years
70	3.2 years	3.6 years
75	2.3 years	2.8 years
80	1.5 years	2.0 years
85	1.0 year	1.4 years

In addition to the unfairness to individual women of treating women as a class and comparing them with men as a class, the life annuity tables for which Arizona contracted did not even treat the class of women fairly. Arizona's "actuarial equivalent" argument would not have allowed a starting setback for women at the normal retirement age of 65 greater than 4.1 years as of the time

[11] 1973 data: U.S. Bureau of the Census, *Vital Statistics of the United States, 1973: Volume II-Section 5: Life Tables*, Table 5-3 at p. 5-12 (1975). 1978 data: U.S. Bureau of the Census, *Vital Statistics of the United States, 1978: Volume II-Section 5: Life Tables*, Table 5-3 at p. 5-13 (1980).

it adopted its plan, yet the tables it agreed to use included constant setbacks of 5 years and 6 years. Its argument would require that the tables used recognize the substantial narrowing of the sexual differences in average longevity as retirees become older, by providing only a maximum 3.2-year setback for those surviving to age 70, a 2.3-year setback for those surviving to age 75, etc., or by some other means. Yet the sexually disparate tables for which it bargained use constant setbacks. When Arizona's own argument for class-based comparisons is put side-by-side with its practices, it is clear that Arizona is requiring women as a class to subsidize men as a class.

B. Arizona's pension plan cannot be sustained as being within the "open market" exception of *Manhart*.

The remaining contentions of petitioners and their *amici* seek to justify Arizona's pension plan incorporating sex-based life annuities as simply reflective of what is available on the "open market" and thus within the exception enunciated in this Court's decision in *Manhart*; or in the alternative, as nondiscriminatory because the "open market" does not allow Arizona to purchase unisex life annuities for its employees or because female workers may elect a nondiscriminatory "lump sum" option or annuity option for a fixed term of years. Both of these arguments are legally without merit and, in addition, are based upon erroneous factual assumptions about life annuity policies available on the "open market."

1. *Arizona's Plan Does Not Fit Within the "Open Market" Exception of* Manhart *Because the State Did Far More Than Allow Employees to Purchase Whatever Life Annuity Policies Were Available on the "Open Market".*

At the end of its discussion of the liability question in *Manhart*, this Court limited the reach of its holding by adding:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the

> statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan.

435 U.S. at 717-18 (footnotes omitted). Petitioners and their *amici* contend that Arizona's plan fits within this "open market" exception to *Manhart*'s interpretation of Title VII, but their argument gives this exception a significance out of all proportion to its function in *Manhart*.

Though self-evident, it bears noting that Arizona did not offer its employees the type of pension arrangement described by the Court in *Manhart*. It did not offer all employees, male and female, only the opportunity to take a lump-sum payout at retirement which the employees would then have to convert to a life annuity on the "open market." Nor did it inform its employees that they could elect payout in the form of whatever life annuity they could contract for on the "open market" at the time they elected to participate in the plan. Instead, the state apparatus affirmatively selected a limited number of life annuity plans—all based on single-sex mortality tables—to make available to its employees. Thus, even if a female employee of the state were able to find an annuity based on a unisex mortality table on the "open market," she is precluded under the Arizona plan from electing that payout option if it is not one of the plans or companies pre-selected by the Governing Committee. The advantages of tax deferral after the age of retirement and of group bargaining power are thus lost to the individual

employee who seeks to avoid the discrimination inherent in sex-based annuity tables.

It is one thing for an employer to institute a retirement savings plan, return accumulated contributions to each employee at retirement, and allow each retiree to do with the savings whatever he or she wishes, without any further contact from the employer. It is quite another thing for the employer to adopt a plan limiting the choices of its employees, and in that process contract for only one type of life annuity with explicitly discriminatory conditions, thus imposing a heavy burden in lost tax deferral or reduced security for any woman desiring to avoid the explicit sexual discrimination. *Manhart*'s immunity for the employer who merely makes available the "open market" to its retirees simply does not cover the conduct at issue here.

Petitioners' related argument that they did not intend to discriminate because the insurance companies with which they contracted, rather than the state, initiated the sexually disparate benefit tables for life annuities, is equally groundless. It is settled law that both parties to a discriminatory contract are liable for any discriminatory provisions which it contains, regardless of who initially sugested the discriminatory provisions.[12]

Petitioners also deny intent on the basis of the decision in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), but that case emphasized the ab-

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[12] The leading case is *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *See also Williams v. New Orleans Steamship Ass'n*, 673 F.2d 742, 750-51 (5th Cir. 1982); *Williams v. Owens-Illinois*, 665 F.2d 918, 926 (9th Cir., 1982); *Farmer v. ARA Services*, 660 F.2d 1096, 1104 (6th Cir., 1981); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2nd Cir., 1980), *cert. den.*, 452 U.S. 940 (1981); *United States v. N.L. Industries*, 479 F.2d 354, 379-80 (8th Cir., 1973); *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90, 95 (3rd Cir., 1973), and cases there cited.

sence of an explicit gender-based classification in finding that there was no discriminatory purpose. 442 U.S. at 267-69, 273-74. In the absence of such a classification, it was necessary to look further for evidence of discriminatory intent. The case does not help petitioners, because the discrimination here was explicit.

Finally, petitioners urge that the district court did not find discriminatory purpose. The statement of the district court was that the petitioners' agreement with the insurers "is somewhat less than the purposeful invidious gender-based discrimination necessary for a finding that the compensation plan violates the equal protection clause". Pet. App. A-21. With respect, the district court erred on the applicable standard for determining discriminatory intent. No showing of malevolance—of specific intent to injure the disfavored sex—is required. In *Mississippi University for Women v. Hogan*, —— U.S. ——, 73 L. Ed. 2d 1090, 1098 (1982), this Court held that even a motive to protect women may result in a violation of the equal protection clause. The "recitation of even a benign, compensatory purpose" may not be enough to save a facially discriminatory provision. 73 L. Ed. 2d at 1100, *quoting Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Here, the gender classification harms women. Petitioners cannot escape the conclusion that they have intentionally discriminated against women.

2. *Arizona's Plan Does not Reflect the "Open Market," Because the State Could Have Contracted for Unisex Table Life Annuities.*

Apparently recognizing that Arizona's pension scheme does not come within the literal language of the *Manhart* "open market" exception, petitioners and their *amici* nevertheless contend that the plan should be sustained under Title VII because it is the functional equivalent of the exception in assertedly offering employees a fair reflection of what is available on the open market. *See, e.g.*, Petitioners' Brief at pp. 14-15. In essence, petitioners raise an affirmative defense of impossibility, and it was

accordingly their burden to adduce evidence supporting the defense.[13] If that evidence is not contained in this record, then the judgment below must be sustained.

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[13] When any defendant seeks to set up an affirmative defense, it has the burden of persuasion in establishing the facts on which the defense rests. *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980) ("duress is an affirmative defense to be pleaded and proved by the party attempting to rely on it"); *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (a party raising the defense of mootness has a "heavy burden of persuasion"); *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962) (an owner attempting to escape liability for the unseaworthiness of his vessel by showing that he has been relieved of his obligation "has the burden of establishing the facts which give rise to such relief"); *United States v. Poland*, 251 U.S. 221, 227-28 (1920) (status as a bona fide purchaser "is an affirmative defense which he must set up and establish.").

In Title VII cases, the contention that a challenged test or educational requirement is job-related raises an affirmative defense, and the employer then has the burden of persuasion in proving the validity of the practice. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-36 (1971). An employer with a facially sexually discriminatory policy of refusing to employ women in particular positions has the burden of proving a bona fide occupational qualification. *E.g.*, *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370-72 (11th Cir. 1982), and cases there cited.

It is clear that the burden in question is a burden of persuasion and not merely the burden of production or of articulation discussed in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Griggs*, the employer rested on testimony articulating the company's judgment that the challenged requirements would generally improve the overall quality of the work force. This Court rejected the articulation as insufficient and held that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 431-32. Similarly, the degree of the factual detail *Albemarle* held employers must show in order to establish validity is inconsistent with a mere requirement of production or of articulation. 422 U.S. at 431-36. In *Connecticut v. Teal*, 73 L.Ed. 2d at 140, this Court stated that respondents' rights were violated by the challenged test "unless petitioners can *demonstrate* that the examination given was not an artificial, arbitrary, or unnecessary barrier" by proving it was valid. (Emphasis supplied).

The affirmative defense of impossibility raised by Arizona requires at a minimum three factual showings: (1) that no companies offered unisex life annuity benefits, (2) if so, that Arizona's bargaining power would not have been sufficient to induce companies not then offering such benefits to agree to provide them to Arizona, and (3) if so, that there would have been no other means by which Arizona could have offered life annuities to its employees on the basis of equal monthly payments for men and women of the same age.

Arizona's sole factual support for its impossibility contention rests on a strained reading of the parties' agreed factual statement.[14] After a detailed discussion of the specific named companies Arizona had selected for inclusion in its plan, JA 7, after a discussion of the additional named companies added to the plan or dropped from it, JA 8-9, after a description of the exhibits to the agreed statement containing the specific provisions offered by these named companies (*Id.*), and after a generalized description of the life annuities offered by the named companies participating in the plan, there is a paragraph containing the isolated sentence on which Arizona pins all its hopes. JA 10. This paragraph begins by referring to the "mortality tables which are published in the contract with the particular company", and continues in pertinent part:

> . . . The amounts received are determined by the use of actuarial tables published by the particular company. All tables presently in use provide a

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[14] In their Reply in support of their petition for certiorari, petitioners sought to draw comfort from the statement in the district court by an attorney for respondents that he did not know whether there were companies in Arizona prepared to offer plans based on unisex tables. Reply at 2. Petitioners have wisely chosen not to rely on this statement in their brief on the merits; a confession of this lack of knowledge by plaintiffs' counsel does come close to satisfying the defendant's burden of proving impossibility.

> larger sum to a male than to a female of equal age, account value and any guaranteed payment period.
> . . .

JA 10. Arizona stresses the second sentence in the above quotation, insisting that it refers to all life annuity tables in existence, not merely to the tables in the plans it approved.[15]. Respondents disagree.[16]

Seen in context, the normal and natural meaning of the stipulation is only that the tables used in the plans approved by petitioners are sexually disparate. *Cf. Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."), *quoted in Chandler v. Roudebush*, 425 U.S. 840, 848 (1976).

The *amicus* brief of the American Council of Life Insurance ("Council") states at 10 and 24 that the Council "is not aware of any private insurance company which offers an annuity plan which does not calculate benefits according to sex-specific mortality tables." Arizona's reply in support of its petition for certiorari—but not its brief on the merits—relies on a similar statement by the Council in its *amicus* brief to the Ninth Circuit to support its defense of impossibility. Putting aside the serious question whether an affirmative defense can ever be established in the absence of any facts of record whatsoever, simply on the basis of a statement in an *amicus* brief, the Council's statement is insufficient to establish even the first of the three showings Arizona would logically have to make in order to sustain its impossibility defense. *First*, if the Council's statement means that it

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[15] As if hopeful that mere repetition would make the assertion stick, Arizona has repeated this representation in its Brief at 3, 5, 9, 11, 14, 15, 17, 20, 26, and 27.

[16] See respondents' Opposition to the petition for certiorari at 1.

is unaware of any insurance companies willing to provide employers with group life annuity plans based on unisex tables, its knowledge is demonstrably incomplete. The Lincoln National Life Insurance Company—one of the companies used by Arizona in its plan—has informed *amici* in response to a telephone call that, if the potential customer's business is large enough, it is willing to provide group life annuities providing the same monthly annuity payments to men and women of the same age who have invested the same amounts. It does this on the basis of unisex tables which take into account the ratio of male employees to female employees.[17] Moreover, the Minnesota Mutual Life Insurance Company and the Northwestern National Life Insurance Company provide group life annuities to faculty members of the University of Minnesota, based on unisex tables providing equal monthly benefits for men and women of the same age who invest the same amounts.[18] Arizona's plan allowed for the use of out-of-State insurance companies,[19] and there is no rea-

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[17] See the affidavit of Richard T. Seymour, lodged with the Clerk. See n. 20, *infra*.

[18] *The Chronicle of Higher Education*, Vol. 25, No. 7, October 13, 1982, at 25-26.

[19] Rule R2-9-07(A) of the Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, Exhibit 1 to the Joint Stipulated Statement of Facts, imposes no geographic limitations on the insurance companies offering annuities under the plan. By contrast, part (B) of that rule limits the banks, savings and loan associations and credit unions offering savings accounts under the plan to those having their principal offices in Arizona. Licenses to do business within a State are, of course, necessary, but these are not difficult to obtain. In point of fact, all of the insurance companies offering life annuities under the plan have their corporate headquarters outside of Arizona. Lincoln National LIC's home office is in Fort Wayne, Indiana (Exhibit 3); National Investors LIC's home office is in Little Rock, Arkansas (Exhibit 4); Variable Annuity LIC's home office is in Houston, Texas (Exhibit 5); Hartford Variable Annuity LIC is a South Carolina company with

son to suppose that Arizona could not have obtained similar annuities either from Lincoln National or from the companies doing business with the University of Minnesota. *Second*, if the Council's statement be taken to mean only that sex-specific mortality tables would have to be considered in setting up the overall level of benefits under a unisex table,[20] this would still not offer a legal defense for Arizona's explicit agreement for lesser monthly benefits to women.

Neither Arizona nor the *amici* which have filed briefs in its support have addressed the other facts essential to a showing of impossibility. The Council emphasizes that the market power of Arizona and of other employers enables them to bargain for—and to obtain—annuity benefits substantially better than those available to individuals. Brief at 24. No reason appears why Arizona could not have bargained for, and obtained, tailor-made life annuity plans which offered equal monthly payments to men and women. Arizona has not even tried to show that it raised the question in its bargaining.

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executive offices at Hartford, Connecticut (Exhibit 6R); and ITT Life Insurance Corporation's home office is in Thorp, Wisconsin (Exhibit 7).

[20] *Manhart* recognized this possibility, 435 U.S. at 718. The Council recognizes this possibility although it is worried by the problem of possible fluctuation in workforce composition, Brief at 21-22. The American Academy of Actuaries ("Academy") by contrast, urges that provision of equal monthly life annuity payments would cause little difficulty or expense in the larger defined benefit plans, even asserting that the "normal" monthly pension benefit is already equal for similarly situated men and women. Brief at 19-20, 22-23. Its concern is with smaller defined benefit plans, but no reasons appear in its brief why smaller employers could not be combined into larger groups for purposes of risk-pooling, as is done with health insurance. Moreover, the larger the plan, the less risk of sharp fluctuations in male/female ratios. Council Brief at 21 n.12. The Academy seems to state that an affirmance of the Ninth Circuit would cause little problem for defined-contribution plans, except for the problem of adverse selection. Brief at 16-18.

Nor has Arizona shown that it had no choice but to use existing insurance companies to provide annuities. Other devices, such as the establishment of a State governmental corporation to sell annuities and make monthly benefits, may have been feasible. Arizona has simply not met its burden.[21]

Petitioners are also precluded, as a matter of law, from seeking to justify the inclusion of the discriminatory life annuity option in their plan on the basis of the "lump sum" payout option available to women enrolled in the plan. From the above discussion, it is clear that the lump-sum option imposes a heavy price on its exercise. The option of an annuity for a fixed period of years should be even less attractive for women than for men. Neither of these payout alternatives constitutes a nondiscriminatory option available to women which can sustain Arizona's pension plan.

Just last Term, this Court held that a male was sufficiently disadvantaged by a rule barring men from a State-supported nursing school in his hometown to be able to mount a challenge to the rule under the Equal Protection Clause. He had the "nondiscriminatory option" of attending a different State-supported nursing school in a different area, but would be disadvantaged by the inconvenience of having to drive "a considerable distance" from his home and by being deprived of credit for additional training working while attending school. *Mississippi University for Women v. Hogan*, 73 L. Ed. 2d at 1098 n.8. The so-called "nondiscriminatory option" here

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[21] As to the claims of "revolution", the brief of the American Academy of Actuaries—which takes no position on the ultimate issue herein—makes clear that the insurance and pension industries can accommodate an affirmance of the Ninth Circuit, as long as the decisions of the courts take into account the effects of differences in various types of pension and annuity benefits. This can best be done on a case-by-case basis, inasmuch as variations among plans seem to be legion.

would involve far greater cost or, in the case of fixed-term annuities, far less security, than the challenged option. The disadvantages here are much more substantial than those found sufficient for the challenge in *Hogan*.

II. BECAUSE *MANHART* GAVE EMPLOYERS ADEQUATE WARNING OF THE TITLE VII REQUIREMENTS FOR PENSION PLANS, THE AWARD OF MONETARY RELIEF BELOW WAS JUST AND PROPER.

It seems evident that an intentional discriminator has no good objection to the entry of a back pay award against it. While Arizona argues that one of the purposes of the program was to take advantage of tax incentives while avoiding any non-administrative expense to the State, the way to achieve that goal was to have avoided unlawful discrimination.[22]

Arizona's objection to a back pay award is further undermined by its having ignored the extraordinary "grace period" this Court allowed employers with discriminatory pension schemes in *Manhart*. The Court stated that there was no reason to believe that employers would have failed to abide by Title VII if they had understood the law's application to pension systems, and added:

> There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision.

435 U.S. at 720-21. If Arizona had heeded the necessary application of the *Manhart* decision to discriminatory

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[22] The expense of a monetary recovery will in any event be light; the plan is a relatively new one and only four women selecting the life annuity option had retired as of the time of the stipulation. JA 6.

benefits and had cleared up its problem within a reasonable time after announcement of the decision, it would clearly have been entitled to a clean slate in terms of monetary relief.

Like most other employers, however, Arizona decided to ignore this Court's offer of a grace period and to fight every step of the way against conforming its policies to the requirements of Title VII.[23] The certain prospect of back pay relief is as essential to obtain compliance in the area of annuity benefits as it is in other areas of employment.

Manhart's denial of back pay was based on a premise shown by experience to have been faulty. To allow another grace period would reward intransigence and diminish respect for the law's demands. To give recalcitrant employers such as Arizona even the benefit of a grace period to the date of the *Manhart* decision would give to employers who have proven their recalcitrance a benefit based on an assumption of good faith. This would effectively postpone the effective date of Title VII to the date of the *Manhart* decision and frustrate the purposes of Title VII.

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[23] Despite the 1978 decision of this Court in *Manhart*, and despite the 1981 decision of the Southern District of New York that such practices are illegal, for example, the City of New York still deducts a higher percentage of its female employees' pay than of similarly situated male employees' pay for its retirement plan, and still provides lower monthly retirement allowances to female retirees than to similarly situated male retirees over the course of their lives. See *Women in City Government United v. City of New York*, 515 F.Supp. 295 (S.D.N.Y. 1981).

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 42 U.S.C. § 2000e-2(a)(1)(1976) applies to the Arizona voluntary deferred compensation plan so far as it provides an option to participants to elect a life annuity provided by insurance companies using sex-segregated mortality tables.

2. Whether the order of the Court below, though not directed to any insurance companies, constitutes the regulation of insurance contrary to 15 U.S.C. § 1012(b)(1976) which thus precludes that Court from thus indirectly forcing the use of unisex tables on insurance companies or otherwise disrupting their markets.

3. Whether actuarially equivalent annuities are equal so they do not discriminate against any individual on the ground of sex contrary to 42 U.S.C. § 2000e-2(a)(1)(1976).

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STATEMENT OF INTEREST

The National Association of Insurance Commissioners (NAIC) is an unincorporated association. Its members are the principal regulatory officials charged by state laws with the supervision of the business of insurance within the United States. By consent of both Petitioners and Respondents, the NAIC files this brief as amicus curiae.

The state insurance commissioners and the public they protect have a vital interest in the outcome of this litigation. Jurisdiction to regulate insurance has been allocated to the states by the McCarran-Ferguson Act, 15 U.S.C. § 1011-15 (1976). Any decision that affects jurisdiction to regulate is of great interest to the commissioners, for it has potentially important impact on the performance of their regulatory tasks and significant consequences for the insurance industry they regulate and the public state insurance regulation exists to protect.

Affirmance of the decision below in this case would put important constraints on the market for annuities and insurance and would necessitate an important revision in the pattern of state regulation of the mortality tables, rates and benefits relevant to such insurance products. For that reason, the NAIC believes it may be of help to this Court to have a view of the case from the perspective of the state insurance regulators.

STATEMENT OF THE CASE

The NAIC accepts the statement of the case made by the Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS IN SUPPORT OF PETITIONERS

SUMMARY OF THE ARGUMENT

In the case at bar, the decision below was that it violated 42 U.S.C. § 2000e(a)(1)(1976) for Arizona to provide life annuities offered by insurers using sex-segregated mortality tables as an option in a supplementary deferred compensation plan. The state expected to make no contributions to the plan.

Relying on *City of Los Angeles, Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978), those courts thought

that because women would receive smaller periodic annuity payments under the life annuity option the plan discriminated against women, though all other options were sex neutral. Arizona would have to make up the deficits.

Arizona then withdrew that option to avoid having to supplement the annuity payments to women. Arizona's actions clearly indicate what employers will do if *Manhart* is interpreted to require them to contribute additional funds to women's retirement benefits. The same thing will happen in basic annuity plans to which employers contribute. That will disrupt the market, contrary to this Court's expressed intention in *Manhart*. If insurers seek to avoid that disruption by adopting unisex tables, male participants will tend to withdraw from the life annuity option.

The legislative history shows that Congress can not have thought much about the consequences of adding "sex" to the prohibition. It is not believable that Congress would have adopted the amendment if its members had had any idea that the courts would interpret it to have such disruptive effect.

Further, Congress in the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)(1976), allocated regulatory power over insurance to the states, except where Congress specifically indicates otherwise. It did not so indicate in the statutes relied on here. The order of the Court below did not address insurance companies directly, but realistically the order significantly governs and disrupts the insurance business. The Act so interpreted is the regulation of insurance in a way inconsistent with the McCarran-Ferguson Act.

The states, including state insurance departments, are not insulated by McCarran-Ferguson from changes in our society. They have long been as much concerned about unfair discrimination, including unfair sex discrimination, as federal agencies. In some areas insurance department concern long antedated federal involvement. In insurance state concern is also more continuous and pervasive.

While insurance departments have concluded that sex, properly used in accordance with sound actuarial practice, is an appropriate classifier for some kinds of insurance, its *unfair* use has been frequently addressed by state insurance departments and will continue to be investigated. Because insurance commissioners have greater expertise in insurance and a more constant and pervasive presence there than any other agency, the best locus for regulation of unfair discrimination in insurance pricing is in the state insurance departments.

The decisions in the courts below should be reversed and the complaint of Nathalie Norris et al. dismissed.

ARGUMENT

I. THE ULTIMATE CONSEQUENCE OF AFFIRMANCE OF THE CIRCUIT COURT OF APPEALS DECISION IN *NORRIS* V. *ARIZONA GOVERNING COMMITTEE* IS LIKELY TO BE THE SUBSTANTIAL DISRUPTION OF THE MARKET FOR INSURED LIFE ANNUITIES.

Careful planning for old age requires that a person insure against the risk of living too long, i.e., against the consequences of outliving both one's capacity to earn and one's savings. The only adequate way for most people to solve this serious problem is to purchase, with at least some portion of savings and in many cases all or substantially all of them, an insured life annuity in which the insurance company assumes the risk of the extension of life beyond the capacity to earn a living and after savings would have been exhausted in the absence of an annuity. If savings were consumed in the absence of an annuity, on the assumption that life would continue only approximately as long as one's life expectancy, savings would be exhausted a considerable time before death in a significant percentage of instances.

A life annuity is the converse of life insurance. The protection afforded by it is even more important at the end of life than is life insurance in the younger years, except for people who have accumulated considerable wealth.

The consequence of the District Court decision in *Norris* v. *Arizona Governing Committee,* as affirmed by the Court of Appeals for the Ninth Circuit, was entirely predictable. Arizona already had a separate contributory retirement program to which it had allocated that portion of its budget it thought appropriate to devote to aiding employees create a retirement program. The plan involved in this case was a supplementary voluntary deferred compensation plan devised to assist employees who wished to take advantage of provisions of the Internal Revenue Code permitting tax-deferred saving for retirement by a deduction from salary. Because it was a voluntary program planned as an accom-

modation to employees, the state did not intend to make a contribution to it and did not budget for such a contribution. There was nothing improper in Arizona both facilitating the tax deferred saving by employees and declining to contribute further state resources to encourage the saving. Nevertheless, the defendants were enjoined "from carrying out their obligations under Ariz. Rev. Stat. Ann. § 38-871 *et seq.*, through the use of sex-segregated tables and directing that future annuity payments to female employees who have retired shall be equal to similarly situated male employees." *Norris v. Arizona Governing Committee*, 671 F.2d 330, 335 (1982). The state must make up the difference on the monthly payments of those women employees who have retired. Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, p. 5. Faced with the prospect of such additional contributions to retirement programs of women retiring thereafter, Arizona terminated the life annuity option for the future, so that the plan created for the accommodation of employees would not increase the state's operating costs. This action deprived all the state's 35,000 employees who were not yet retired, both men and women, of the important life annuity option. *Id.*

Termination of the life annuity option left two options open to participants: a lump sum withdrawal of accumulated funds at the point of retirement and an annuity for a term of years. The exercise of the option of a lump sum withdrawal of accumulated savings may have the adverse tax consequence of requiring payment of tax on the entire amount at that time. Further, if the participant goes into the open market with the lump sum to buy a life annuity, he or she does so as an individual buyer, usually with little knowledge of this technical market and without the advantage of mass purchasing power the state had which might have resulted in substantial savings in the expense portion of the annuity consideration.

Electing the second option, an annuity for a term of years, may reduce the transaction costs substantially but it fails to provide the requisite protection against excessive length of

life. A substantial fraction of the participants will, under that option, receive larger annuities in the early years but will be left with sharply reduced income during the last years of life.

There is no reason to doubt that what has happened in this voluntary deferred compensation plan will happen in a large proportion of all such plans, which are very common whenever the advantage of tax deferral is available. More important, it will also happen with many if not most basic retirement programs to which employers contribute. Because the Equal Pay Act forbids employers to eliminate unlawful discrimination in compensation by reducing the contributions on behalf of men to keep total contributions the same, 29 U.S.C. § 206(d)(1) (proviso), many current programs are such that this case if affirmed would require additional employer contributions to equalize the periodic annuities paid to men and women.

Thus, if one of the available options under any existing plan is a life annuity offered through an insurance company that uses sex-segregated mortality tables, *Norris* v. *Arizona Governing Committee,* if affirmed, together with the Equal Pay Act would require the employer to make additional contributions to equalize the periodic annuity payments as between men and women under that life annuity. No one can doubt, therefore, that the ultimate consequence would be to create substantial employer uncertainties and induce many employer withdrawals from life annuity options in any plans subjecting or having the possibility of subjecting the employers to the requirement of making such additional contributions. Such withdrawals would destroy a significant part of the market for life annuities and would be a revolutionary change in the pension and insurance industries, for insured life annuities would cease to be available to a large share of the potential market. The insurance solution to the old age problem would immediately be much less readily available to protect people against one of the serious problems of old age, that of outliving one's sources of income.

II. IF INSURANCE COMPANIES TRY TO RESPOND TO THREATENED WITHDRAWAL OF EMPLOYERS FROM THE LIFE ANNUITY MARKET BY SHIFTING TO UNISEX MORTALITY TABLES, EXTENSIVE MALE EMPLOYEE WITHDRAWAL FROM THE LIFE ANNUITY MARKET IS THE LIKELY CONSEQUENCE.

Faced with the threatened loss of a significant portion of their share of the retirement income market because of natural employer reluctance to increase contributions to retirement in order to supplement female annuity payments, some insurance companies may consider responding by changing from sex-segregated to unisex mortality tables. Such changes have already been contemplated by some companies. Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, p. 7.

If a contributory retirement plan gave the employee only a single option, the purchase of a life annuity from an insurer using a unisex mortality table, male employees would not be able practicably to withdraw from the retirement program for that would mean forfeiting the employer's contribution. This scheme would also seem to satisfy the demands of the law as interpreted in the Court of Appeals decision in *Norris* v. *Arizona Governing Committee*. Before affirming that decision, however, the Supreme Court might wish to contemplate the long-range consequences.

Male employees would gain from the decision a strong incentive to put all the pressure they can on employers to provide such other options as Arizona provided in this case: lump sum withdrawals of contributions on retirement and annuities for a term of years. The effort should often succeed. Annuities for terms of years would appear especially advantageous to men; actuarially such annuities would be worth appreciably more to men than life annuities based on a unisex table and would appear to be even more attractive than they really are for periodic payments would be larger than for life annuities and the tax "bite" might not be much

different. Such annuities could not be attacked as discriminatory under Title VII.

With increasing sophistication of the working population, particularly of that portion of it protected by substantial retirement plans, there would be a considerable incentive for male employees to rely for protection against too long life on Social Security alone, while putting most of their retirement savings into forms that do not provide insured protection against excessive length of life. That is, the natural consequence of a shift to unisex tables is ultimately to remove large numbers of male employees from the life annuity market and put them into the market for annuities for a term of years, thus revolutionizing the insurance and pension industries and drastically reducing the role life annuities would otherwise play. A shift to unisex tables would thus not prevent the serious disruption of the market for life annuities. The cost of such annuities to women would then rise as men withdrew, eventually approximating the present cost under sex-segregated tables. There is no reason to doubt that men would select among the available options those appearing to be most advantageous to them.

No one can predict the exact dimensions of the changes that would occur, but no one can doubt their direction. While not every human decision is an economically rational one, a large percentage are. The TIAA response to the uncertainties in the law and the pressures from some universities was to propose to change to a unisex table, to preserve the TIAA market. *Id.* Even if that change finally takes place, it is only the first act of the play.

The second act is increased pressure by male employees on employers to expand the options available to them. That pressure is now already beginning to occur in some universities for other reasons; the pressure could only increase. The Arizona response was predictable and its ultimate consequence clear—all state employees were deprived of the valuable life annuity option for the application of supplemental retirement savings. Similar undesired consequences would

follow if insurers should change to a unisex table. If employers are denied the freedom to use the free market, inefficiency results, distribution costs rise, women lose in added costs of a less efficient insurance system more than they gain from the unisex tables and everyone will be worse off than before, women as well as men.

III. IT IS NOT CREDIBLE THAT CONGRESS INTENDED IN TITLE VII TO IMPOSE CONSTRAINTS ON INSURANCE AND PENSION PROGRAMS THAT WOULD HAVE SUCH POTENTIALLY DRAMATIC AND UNSETTLING IF NOT DISASTROUS CONSEQUENCES, REVOLUTIONIZING THE INSURANCE AND PENSION INDUSTRIES.

This Court said in *Manhart* that it did not suggest "that the statute was intended to revolutionize the insurance and pension industries." *City of Los Angeles, Department of Water and Power* v. *Manhart*, 435 U.S. 702, 717 (1978). As *Manhart* is interpreted by the Court of Appeals for the Ninth Circuit in *Norris* v. *Arizona Governing Committee*, such an effect of Title VII on those industries is more than possible; it is probable. Is it believable that Congress would have enacted a provision with the intent to bring about such momentous changes?

The central question for consideration is whether section 703(a)(1) of the Civil Rights Act of 1964, as amended, was intended to invalidate the Arizona voluntary deferred compensation plan so far as it provided for life annuities through insurers using sex-segregated annuity tables. That section states that it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a)(1)(1976).

The word "sex" was not in the original bill. The addition of "sex" to the bill as a prohibited basis for discrimination in employment came in a floor amendment, and was not preceded by any studies, legislative hearings, or public dis-

cussion. It was proposed by a Congressman who voted against the Act and who, it has been suggested, introduced the amendment as a strategy for cluttering up the Act so it would have no chance of passage. Bernstein & Williams, Title VII and the Problem of Sex Classifications in Pension Programs, 74 Colum. L. Rev. 1203, 1216-17 (1974). See 110 Cong. Rec. 2581 (1964) (remarks of Congresswoman Green).

The discussion on the floor of the House was extensive, but it was mostly high-flown rhetoric. *Id.* pp. 2577-2584. It began on a note of levity but then became a bit more serious. It did not address the question what Congress actually thought it was doing by adding "sex" to the bill. In her speech opposing the amendment, Congresswoman Green of Oregon emphasized that the main purpose of the bill was to help blacks, who had been discriminated against far more than women. She did not want to risk the bill by virtue of the amendment. She emphasized that there was not a word of testimony on the subject and no petition by any women's organization asking for the amendment. She even read a letter from the American Association of University Women opposing it. (Another women's organization supported the amendment). The writers of the AAUW letter considered the amendment redundant and to the disadvantage of the legislation. Congressman Roosevelt pointed out that his mother had chaired the President's Commission on Opportunities for Women. He pointed to the complexities of the problems of providing equality in employment for women and said that when a report was forthcoming and a recommendation had been made, the House would try to find a way to eliminate discrimination against women without the harm that might result from legislating unwisely.

From the welter of words nothing emerges to give a clue to the intended meaning of an amendment that was introduced for unknown reasons, that was not preceded by the study one would expect of an important change in the law that might produce the dramatic alteration in complex relationships

urged by the plaintiffs in this case. It passed by the fairly even vote of 168 to 133. *Id.*, 2584.

In short, there is no basis in the legislative record for even guessing what Congress, or individual Congressmen or Congresswomen intended to do by adding the word, if they voted for its addition. Of course the amendment was meant to do something, but just what is not clear. At least it was surely not intended to work the radical changes for which various people including plaintiffs now seek to use it.

Trying to solve one problem of alleged illegal sex discrimination under the Act, the Court of Appeal for the Fifth Circuit, speaking through Simpson, J., said in *Willingham* v. *Macon Telegraph Publishing Co.*:

> We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate. 507 F.2d 1084, 1090 (1975).

In *Manhart* this Court decided that the provision invalidated a retirement plan under which larger sums (by a factor of 14.84%) were deducted from the salaries of women than of otherwise comparable men, thus reducing the take-home pay of women more than that of men by that factor. But this Court confirmed the wisdom of the restraint in *Willingham* by saying in the key paragraph in Justice Stevens's majority opinion:

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. *All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund.* Noth-

> ing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market. Nor does it call into question the insurance industry practice of considering the composition of an employer's work force in determining the probable cost of a retirement or death benefit plan. Finally, we recognize that in a case of this kind it may be necessary to take special care in fashioning appropriate relief (emphasis added). 435 U.S. 702, 717-18 (1978).

To enlarge the meaning of this Court's cautious language in *Manhart* into a sweeping condemnation of long accepted actuarial classifications in the insurance and pension business must rest on an implicit assumption that Congress gave the kind of careful thought to this matter that the legislative record patently shows it did not give.

It is simply not believable that the Congress can have intended the drastic consequences that would flow from affirmance of the Court of Appeals decision in *Norris* v. *Arizona Governing Committee*. For Congress to act in a way that would make it more difficult for the institutions of the private sector to provide protection against poverty in extreme old age is not credible, in the absence of careful and deep-probing study, committee analysis, and public hearings.

Yet, despite the casual way unfair sex discrimination was introduced into the Civil Rights Law, it is obvious that Congress did launch a first preliminary attack on a real problem, expressing in general terms an emerging public policy to which most contemporary Americans subscribe. Such legislative activity, however preliminary it may have been, is consonant with prevailing contemporary attitudes. Those attitudes, however, are reflected quite as much in what is happening in state legislatures and regulatory agencies as at the national level. It is not without irony in this connection that a third of the states have equal rights amendments

in their constitutions while the United States does not. It is relevant, therefore, to look at the Congressional determination about the allocation of power in the federal system in dealing with insurance. Even though the national agencies and those of the states are subject to similar pressures, derived from changes in public attitudes and interests, the exact parameters of any solution that may be adopted and the manner of implementing it will be different depending on how power to deal with an area is allocated.

IV. CONGRESS HAS ALLOCATED TO THE STATES THE PRIMARY RESPONSIBILITY TO DETERMINE THE PARAMETERS OF PUBLIC POLICY WITH RESPECT TO INSURANCE AND THE MANNER OF IMPLEMENTING THAT POLICY.

In the McCarran-Ferguson Act, Congress provided decades ago, after serious and deliberate consideration, that

> [no] Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . . 15 U.S.C. § 1012(b)(1976).

There is no mention of the business of insurance in either the Equal Pay Act or in Title VII. While one may be able to argue plausibly that the pension scheme in *Manhart,* which was administered solely by the public agency, and even the voluntary contribution by employees in the present case, are not a part of the "business of insurance," no one can assert that the use of actuarial tables by insurance companies to determine annuities is not within the business of insurance. Further, it is a part of the business of insurance that is everywhere regulated—intensively—by the states. The McCarran-Ferguson Act provision will not, of course, preclude Congress from legislating with respect to the business of insurance but by virtue of its own firm decision it must do so explicitly. It has not done so.

The technical and complex character of insurance underlies the Congressional decision. When the McCarran-Ferguson Act was enacted, the only locus of government expertise in insurance was in state insurance departments. Furthermore, the state insurance departments provided then and provide now an enduring presence in the insurance field, which is lacking in Washington. Not unnaturally it seemed then to make sense to leave insurance regulation where it was and to do so by a firm declaration on the matter. Nothing has happened since then to justify altering that decision. Deciding exactly what should be the bounds of public policy and how it should be implemented in this complex field remains and should remain with the agencies having the greatest expertise and the most enduring involvement in insurance. Those agencies are the state insurance departments.

A not unnatural but fallacious reaction to assertion of the exemption of the business of insurance from the application of Title VII of the Civil Rights Act is to ask why the insurance industry, almost alone among economic institutions in our society, should be immune from implementation of contemporary public policy with respect to human rights. But this is a completely erroneous conception of what Congress did in both Title VII and in the McCarran-Ferguson Act, and it would lead mistakenly to a narrow, even distorted, interpretation of the McCarran-Ferguson Act exemption. In Title VII Congress dealt only with employment relations. In McCarran-Ferguson, Congress was not seeking to immunize insurance from developing views of public policy. It wished to do something quite different. The Act primarily determined that the parameters of public policy and the manner of its implementation would in the insurance field be determined by the states and not by the Congress. The insurance industry was exempted from nothing substantive and subjected to nothing substantive by the Act; it was instead made subject to a different maker and enforcer of the substantive rules. State jurisdiction does not create an immune island for insurance free from the ele-

mental forces operating elsewhere in our society. It only changes the identity of the arbiter.

The McCarran-Ferguson Act is not concerned with substantive rules but with the allocation of power in a federal system. The substantive rules may be the same as they would be under a regime of federal regulation, or entirely different, or partly the same and partly different.

Congress, having given the power to the states to determine and enforce the substantive rules, can take it away again. In recent years there have been numerous proposals in Congress to do just that. The proposals have been based, often, on simplistic and sometimes self-interested evaluation of state insurance regulation as ineffective, a conclusion easy to reach when state regulation is judged against an ideal standard but not so easy to reach when it is measured against the actual performance of other comparable agencies, state and federal, in the real world. Under the latter test state insurance regulation comes out reasonably well.

So far none of the proposals have prevailed or even come close to prevailing. But whatever future decisions are made, Congress declared quite clearly in the McCarran-Ferguson Act that its allocation of power may only be altered by specific attention to the matter in Congressional enactments. There has been no such specific attention to the matter in the Civil Rights Act or the Equal Pay Act.

To further establish that Congress was allocating governmental power and not exempting the insurance industry from conforming to accepted public policy, it is accurate to state that the same concerns about human rights that have exercised Congress in recent years have during the same period been considered and often implemented at the state level, both in insurance and in other aspects of the society. Indeed, state insurance regulation is one of the oldest of the systems of regulation in our society having a mandate to protect the public—the consumer. The mandate dates back to the mid-nineteenth century.

V. THOUGH THE SPECIFIC RESULT OF THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IN *NORRIS* V. *ARIZONA GOVERNING COMMITTEE* DOES NOT HAVE *DIRECT* IMPACT ON THE INSURANCE BUSINESS, IT HAS IMMEDIATE AND DRASTIC IMPACT. IT IS REALISTICALLY THE REGULATION OF INSURANCE.

Before the Court of Appeals for the Ninth Circuit, both appellant Arizona and amicus American Council of Life Insurance argued in this case that the McCarran-Ferguson Act precluded the Court from applying title VII, because the use of sex-based mortality tables was the "business of insurance" and Arizona had separately regulated the business of insurance. The Court of Appeals for the Ninth Circuit thought that argument fallacious, because the Court's order did not address any insurance company.

> The court has not said that the companies may not use sex-segregated annuity tables. Nor has it joined the companies as defendants or required the companies to pay the adjusted annuities. All the court has done is tell the employer that it may not offer a fringe benefit which treats an individual woman differently than an individual man. 671 F.2d 330, 333 (9th Cir. 1982).

This contention sounds plausible on paper but in the real world it is unrealistic. Except in degree the order is no different from an order to the universe of potential employer buyers of insured life annuities forbidding all such buyers to make any purchases from certain insurance companies. That order, though not addressed to insurance companies, would wipe out their market. Though there is no such sweeping order in this case, nor *any* order addressed to the insurance companies, they have effectively been outlawed and their market for group life annuities substantially destroyed. Though in the present case, the effect is less than total and only a share—but a significant one—of their market has been destroyed by the Court's order, the share is likely eventually to be a share so large as to make the rest unviable.

On demand by appropriate plaintiffs, orders would issue to any employer situated similarly to Arizona to refrain from dealing with any insurance company that used sex-segregated annuity tables. While in form that is an order to employers, in result it is an order to insurance companies to change their long-standing practices at penalty of losing their markets. It is the regulation of insurance, not directly but with drastic and immediate impact. If such an order purports to be based on Title VII or the Equal Pay Act, it is imperative that it first be found that Congress worded one or the other of those acts so that it would "specifically relate" to the business of insurance. Neither has any such wording. The Court order gives Title VII the effect of federal regulation of insurance, displacing state regulation contrary to the policy of the McCarran-Ferguson Act.

VI. THE STATES AS WELL AS THE FEDERAL GOVERNMENT HAVE BEEN CONCERNED IN RECENT YEARS WITH THE DEFINITION AND ENFORCEMENT OF HUMAN RIGHTS, BOTH GENERALLY AND IN THE INSURANCE FIELD.

Wide ranging state legislative activity to eliminate sex discrimination, all the way from "correcting" the relatively innocuous male-oriented language of the statute book to the most important of substantive issues within the jurisdiction of the states involving invidious and hurtful discrimination, is well known. It has now been under way for years in most states. State activity to define and enforce rules against unfair discrimination in the field of insurance are less well known because more technical, though equally important. To give some sense of that activity will make it clear that the McCarran-Ferguson Act does not isolate insurance companies from contemporary developments in standards of business morality. State concern has been broad-based, and has dealt with unfair discrimination wherever it has been perceived to exist, not just with sex discrimination. As at the federal level, the degree of success has varied from problem to problem. In addition it has varied somewhat from state to

state. On the whole, however, the states have probably been as successful as the federal government in creating and enforcing new standards of nondiscriminatory conduct. They have solved some problems; others remain to be solved. The important point here, however, is that state jurisdiction does not create an island immune to accepted standards of morality.

In the years that there has been activity and some achievement respecting human rights at the federal level, there has been continuous activity within the insurance regulatory fraternity at the state level. There has been extensive consideration of the use of sex, race, marital status, age, physical and mental disabilities, geographical location, and numerous other variables in rate-making and in underwriting rules in life, annuities, disability, automobile and other forms of insurance. Throughout the United States regulators at the state level have addressed these questions. The consideration has been extensive, sometimes deep-probing, and continuous in the sense that all these problems are under examination all of the time in various parts of the country. The results of the inquiries have not been uniform, for the problems are complex and thoughtful people do not always reach identical results on the corrections to be made in our laws and practices. But there has been no vacuum; the problem of fairness in underwriting and in rating has been much discussed in the state regulation of insurance.

It is inherent in the allocation of power and responsibility to regulate insurance to the states that there will not be national uniformity, for that is inconsistent with the very notion of wide distribution of power in a decentralized and democratic governmental system.

New York has typical statutes enacting into law basic principles of equity in pricing. Dating back to 1939 one has been in essentially the following language:

> No life insurance company doing business in this state . . . shall make or permit any unfair dis-

> crimination between individuals of the same class and of equal expectation of life, in the amount or payment or return of premiums, or rates charged by it for policies of life insurance or annuity contracts, or in the dividends or other benefits payable thereon, or in any of the terms and conditions thereof. . . . McKinney's Consol. Laws of N.Y. Ann., Ins. Law § 209.

Not every state has a statute as venerable, but similar statutes exist throughout the country.

Though it is without direct power, the National Association of Insurance Commissioners has long been both a forum and a vehicle for much of the development. For example, the NAIC has a long-standing Model Unfair Trade Practices Act that serves as a point of departure for discussion of problems of unfair pricing and other unfair marketing activity. (It has been widely, almost universally, adopted by the states in similar form and language). One section of that model act, like the New York Act, prohibits "any unfair discrimination between individuals of the same class and equal expectation of life in . . . any contract of life insurance or of life annuity. . . ." The model does the same thing for health insurance. NAIC Proceedings—1979 Vol. II, p. 262. (The model goes back some decades. The 1979 reference only gives the current formulation).

On the basis of the model act, the NAIC has developed model regulations which have been extensively adopted by the states. A model regulation to prohibit unfair discrimination on the basis of blindness or partial blindness, as adopted in 1978, *id.* 1978 Vol. II, pp. 273-74, 268, 266, led later to adoption of a more general model regulation to prohibit the practice of

> Refusing to insure, or refusing to continue to insure, or limiting the amount, extent or kind of coverage available to an individual, or charging a different rate for the same coverage solely because of a physical or mental impairment, except where

> the refusal, limitation or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience. *Id.,* 1979 Vol. II, pp. 262, 258, 252, 34, 31.

Commitment to "sound actuarial principles," i.e., to charging insureds as accurately as possible for the risk they transfer to the insurance system, is uniformly characteristic of rules proposed by state insurance regulators. The principle was stated by state insurance department actuaries in a recent report as follows:

> If there is to be a viable insurance sytem in this country, it must have a risk classification system that protects the insurance system's financial soundness; that is fair to insurance buyers; and that permits economic incentive to serve the broadest possible market.
>
> It is generally the position of the actuarial profession that insured individuals are treated equally if they are charged prices which equitable (sic) reflect the value of the risks they transfer to the insurance pool—not simply as a matter of theoretical preference but as a necessary condition to the sound operation of insurance programs. Determining the value of the risks transferred necessarily involves the use of averages and classification variables; therefore, the use of averages and class groupings is fundamental to insurance. Consideration of what is fair or unfair in insurance must take place within that conceptual framework. *Id.,* 1982 Vol. I, p. 392.

The statement was contained in a brief report entitled "Review of Sex Distinct Pricing in Individually Marketed Insurance." *Id.,* p. 391. Sex distinctions in pricing and in underwriting practices have been the subject of repeated discussion in the National Association of Insurance Commissioners and a great many states for a number of years. So also have marital status and other variables that have come under suspicion as not having sufficient reliability and there-

fore as constituting unfair discrimination. The inquiry is a continuous one.

One California rule-making decision will suffice to illustrate the activity. Proposed regulations relating to unfairly discriminatory practices based on sex or marital status received a hearing by an extremely able woman hearing officer whose recommendations were then adopted by the Commissioner. She heard testimony from the general public, from various interest groups, especially those representing women, and from the insurance industry. She examined records of similar hearings in New York, Pennsylvania, Michigan, Colorado, Iowa and a report from a California Commission. She considered it all thoughtfully and carefully and recommended adoption of rules that sought to particularize objectionable practices and to eliminate them when they constituted unfair discrimination on account of sex or marital status. The recommendation was in the highest tradition of enlightened public service and became part of the regulatory law and practice of our most populous state. See Ruling No. 204, File No. RH-176, Proposed Decision of Hearing Officer Angele Khachadour, November 19, 1975, and the Decision of Commissioner Wesley J. Kinder based thereon, November 20, 1975.

Various views have existed in state regulatory circles about sex-segregated pricing, as with interested Americans generally. In the late 1970's there was a surge of support in the states for the elimination of sex as a classifier but more extensive study seems to have led to general though not necessarily universal acceptance of the view that is stated in the above actuaries' report. The position is that private insurance needs to be cost-based to be viable, and that classification schemes that do not produce cost-based prices compel cross-subsidies that lead to withdrawal from the system of those providing the subsidies, if they are free to leave. Those who benefit from the subsidies stay as long as the subsidies last, driving the cost up. Cost-based pricing depends on the selection of criteria for pricing that have the greatest predic-

tive value among those about which reliable information can be gathered cost-effectively. Actuaries are in general agreement that sex is such a criterion for several classes of insurance, including both life insurance and annuities.

The National Association of Insurance Commissioners is not speaking defensively when it asserts the primacy of state regulation with respect to unfair price discrimination. The assertion does not concede that the insurance regulatory authorities of the states seek to insulate the insurance industry from modern conceptions of business morality. On the contrary, the assertion is that the problem is complex, that the state insurance regulators are as interested in its solution as anyone else, that they are more expert in insurance than others and are continually present, and that assignment of the task to them is both appropriate and wise. It is as likely to lead to proper solutions as the unwarranted assumption of power and responsibility by certain federal agencies. See Kimball, *Reverse Sex Discrimination: Manhart,* 1979 American Bar Foundation Res. J. 83.

VII. TWO PROMISES MADE TO TWO DIFFERENT PEOPLE THAT PAYMENTS WILL BE MADE TO THEM FOR THE DURATION OF THEIR LIVES ARE EQUAL IN VALUE IF AND ONLY IF THEY ARE ACTUARIALLY EQUIVALENT.

The District Court concluded in this case that the

> administration of the Deferred Compensation Plan of the State of Arizona, which provides or permits smaller monthly annuity payments to a female employee than to a male employee contributing the same amount, is discriminatory and in violation of Title VII of the 1964 Civil Rights Act. *Norris* v. *Arizona Governing Committee,* 486 F. Supp 645, 652 (Ariz. 1980).

The conclusion is erroneous.

Title VII forbids discrimination "against any individual with respect to his compensation, terms, conditions, or

privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1976). The question is whether differences in the periodic annuity payments to men and to women in otherwise comparable circumstances violate that prohibition, when the employer does nothing but arrange for the annuities with independent insurers using sex-segregated mortality tables. It cannot be discrimination in compensation, for no compensation is involved, but it is argued that it is discrimination against women in a *privilege* of employment.

Granted that there was a distinction made between men and women by the payment differential in the life annuity, the Court is faced with the question whether that was unlawful discrimination *against* women or as merely discrimination (a distinction) *between* men and women which is not forbidden by the statute. The preposition "against" is a crucial part of the statute. By using it the statute only forbids disadvantageous discrimination and not neutral discrimination.

Assume a promise is made to a person to pay D dollars per month until some event occurs which is certain to occur at some time but the precise time of which is unpredictable. This describes the traditional life annuity but it describes with equal accuracy an annuity for the length of time an automobile in some unrelated stranger's possession will continue to be roadworthy (by some prescribed test), or for the length of time a stallion can be used for stud purposes, or for the time until the foundations of a seaside house are undermined and it collapses (assuming no protective measures), and a multitude of other annuities. Assume further that it is possible from previous experience to state with acceptable accuracy the probability that the uncertain event will occur in each period in the future. This is analogous to a mortality table.

If one wishes to buy one of these promises what is the promise worth? The cost to the promisor is the sum of each monthly payment from now to eternity, discounted by the

probability that it will have to be paid and by the present value of a dollar paid at that future time. Thus it will be the sum of an infinite number of terms, each being the amount of the monthly payment times the probability that it will come due before the terminating event times the present value of 1 discounted from the date of payment to the present. Terms beyond a reasonable number of years will be infinitesimally small because of the double discount.

When the annuity is described in purely abstract terms, no one would question the above manner of computing the cost of the promise to the promisor. Its cost to the promisee is that cost plus a market-determined fee the promisor charges for handling the transaction. Irrelevant emotional issues such as the needs of retired persons do not confuse us in the abstractly stated case.

Value is thus determined by using a mortality table based on experience, as accurately recorded and interpreted as is possible (with mortality meaning only the duration of payment). If because of different characteristics there are different mortality tables for different classes of cars, stallions or houses, no one would think it amiss.

The development of appropriate mortality tables, or morbidity tables, or burning rates, or rates of automobile accidents of various degrees of severity, or industrial accidents, and so on, is the job of actuaries. Whatever the subject of the insurance or the annuity, two promises have equal value if they are actuarially equivalent, i.e., if the costs to the promisors are the same. (There may be a difference in the risk-bearing fee, based on differences in the variability of results and in characteristics of the respective markets, but that can be ignored for present purposes).

When one appreciates that the value of an annuity is measured not by the amount of each periodic payment but by the present value of their sum, one can appreciate why two persons who receive different periodic payments are being compensated equally. The best example in life annuities is where the ages are different. If two otherwise comparable people retire, one at 65 and one at 70, the two are being

treated equally when the 70-year old receives a larger annuity, even though the 70 year old person may live longer and get a substantially larger total sum. The payment is based on expectation of life, i.e., on the mortality table.

The case is no different for men and women, if proper actuarial tables are used. One can challenge the accuracy of the tables but not the principle of using them. Such a challenge is in effect an assertion that sex is only an imperfect surrogate for the true factors determining length of life, and that those true factors should *and can* be measured and the mortality tables be based on them instead of on sex. If that can be established, sex should then be abandoned as a criterion. But it has not been, and probably cannot be, established.

One can urge either the further refinement of actuarial tables in current use, or their total replacement, but the burden is heavy on one who would do so to show that the proposed new tables are justifiable actuarially. Though there is nothing sacrosanct about the present state of actuarial learning, it is not guesswork but is based on serious study. Replacement of accepted tables is not a casual matter.

The view that sex is an appropriate criterion for classification for rate-making in life insurance and annuities does not mean that there cannot be *unfair* sex discrimination. The traditional setback for women in life insurance has been three years, in annuities six. While the differential *may* be explicable and justifiable it needs to be justified. On the surface it looks like unfair discrimination against women in life insurance by not giving them a *sufficiently large* differential. Some life insurers have also thought so and have sought to exploit the opportunity for profit unfair discrimination always creates for other entrepreneurs. See Kimball, *Reverse Sex Discrimination: Manhart,* 1979 Amer. Bar Fnd'n. Res. J. 83, 136, fn. 137. Another possible case of sex discrimination is the use of proper tables, but the structuring of a plan where rights become vested only after a substantial period of time, and where female employees do not remain

long enough to get any vested rights while males do. Waitresses in a chain restaurant may provide an example.

VIII. SEX IS A VALID RATING CRITERION IN LIFE INSURANCE AND ANNUITIES.

The District Court in *Norris* v. *Arizona Governing Committee* objected to the use of sex as a rating criterion when "other factors affecting longevity, such as smoking habits, alcohol consumption, weight, prior medical history and family history are not specifically taken into consideration. . . ." 486 F. Supp. 645 (1980). To the extent that the gathering of the relevant information about these other factors can be done cost-effectively the criticism is a valid one. It does not lead to the elimination of sex as a criterion, however, but to the compulsory refinement of the classification system by factoring in the other information as well. That would reduce but not eliminate the dependence on sex. Whether this can be done cost-effectively for other factors than age and sex is a problem to which actuaries should give close attention, for the addition of several such factors would make the classification system more fair.

Smoking illustrates the complexity of the problem, however. While it is easy to classify persons by sex, there is no simple two-fold classification of smokers and non-smokers. First, relatively few persons have never smoked. Second, the measure of the effect of smoking on longevity depends on the ages at which a person has smoked, how much, whether smoking was associated with other pollution that in combination with smoking has a synergistic effect on the development of cancer or respiratory diseases, whether the smoker also has cardio-vascular disease, and so on ad infinitum. There is considerable question whether useful information about a person's smoking habits over a lifetime, together with the related exposures that interact with smoking, could be obtained cost-effectively with enough precision to be of any actuarial value.

Age and sex, the two primary criteria used currently in life insurance and annuity pricing, are both inexpensively

and precisely ascertainable. Other data are harder and more expensive to gather and may not be as helpful in predicting either mortality or morbidity. In the absence of full information, one seeking to base prices on costs must use what can be had so long as it has reasonable predictive value.

It is sometimes argued that causality and controllability are requisites of a valid classifier. The argument is that there is no proof that sex differences *cause* differences in mortality, and further that because one cannot choose one's sex it is unfair to penalize one born into the disfavored sex. Neither argument is valid. The actuary seeks to predict cost as accurately as possible in order to make a private business operate successfully. Cause can usually not be established and correlation must be relied on. Nor is cause important in determining price. Rate of incidence is. Further, any unfairness resulting from the uncontrollability of certain characteristics by the individual can best be corrected through taxation and governmental programs, not through distortion of private systems of risk transfer.

CONCLUSION

The action Arizona took after decision below in this case was not unpredictable. There had been no intention to commit state funds to this supplementary and voluntary savings plan. The order of the Court that the state supplement women's annuities quite naturally led Arizona to withdraw the life annuity, the retirement option that had produced the unwelcome result. That action, following the Court's decision, deprived all state employees of the opportunity to take advantage of the only option that would have given substantial protection against outliving sources of income and would also maximize tax benefits. The same withdrawal can be expected in many supplemental *and* basic contributory retirement programs, whenever offering the option subjects the employer to the risk (or the certainty) of having to provide additional funds to equalize women's annuity payments with those of men.

There is a possibility that many or all insurance companies interested in the retirement income market may shift to unisex mortality tables to counter the tendency of employers to withdraw the life annuity option. Then there will no longer be a financial incentive for the employer to limit options. Male employees will, however, acquire new incentives. One will be to press for additional options so they can avoid purchasing a life annuity that is (for them) overpriced. Well-advised males will then probably elect in large numbers the properly-priced annuity for a term certain, taking the chance that they will outlive their sources of income. That course is already attractive because the periodic payments would be larger. For them this would be a rational course, though it will exacerbate the social problem of poverty at extremely high age levels. An alternative is the withdrawal of the lump sum value of the savings to invest in an individual annuity in the open market based on a sex-segregated table. If American insurers were directly forbidden to use such tables, there remains the possibility of purchase from a Canadian or other alien company, unless tax consequences or other difficulties make that an unattractive course of action.

The cost of life annuities on a unisex basis to all participants will rise as more and more men withdraw from the scheme; eventually, if enough men withdraw, the cost will approximate what it would have cost women to buy annuities under a sex-segregated mortality table. They will be no better off than before but the men will be worse off by not being able to insure themselves properly against excessively long life through the cost-effective purchase of group annuities negotiated for by the employer. The advantages of a free market solution will have been lost.

These likely consequences of affirmance of the Court of Appeals for the Ninth Circuit are so dramatic and so substantial that they can be expected to revolutionize the insurance and pension industries. It is not believable that Congress would intentionally have enacted a law having such consequences, on the basis of a floor amendment, without

studies, without public hearings and with virtually no discussion or debate.

The belief that Congress cannot have intended to enact such a seriously disruptive law is supported by the fact that Congress long ago allocated to the states essentially full regulatory power over insurance, except in those instances where Congress itself makes clear that it is restricting the grant of power by wording its own statute to "specifically relate" to the business of insurance. This has been well known to Congress, which has seen many proposals to repeal or amend the McCarran-Ferguson Act. There is no language in the Equal Pay Act or in Title VII that specifically relates to the business of insurance. The Court below thought it was not regulating insurance with its order because the order went only to the employer. This is unrealistic, for the impact on the insurance companies, though indirect, is drastic and immediate. Thus, the order of the Court in this case *is* the regulation of insurance, contrary to the McCarran-Ferguson Act's intent.

The allocation to the states of regulatory power over insurance is not to be interpreted as immunizing insurance companies from contemporary public policy. The state legislatures and state insurance regulators are as much subject to the movements of contemporary opinion as is the Congress. Some states precede Congress in reacting; some states lag behind. Some state insurance regulators have been discussing problems of unfair discrimination in the pricing of insurance for much longer than the Congress has been discussing the matter and over a broader range of types of unfair discrimination. In recent years sex discrimination has been specifically discussed at considerable length in many individual states and in the National Association of Insurance Commissioners. The present posture generally is that unfair discrimination is avoided if pricing is accurately cost-based, i.e., if all distinctions used are justified actuarially.

Sex is actuarially justified as a valid predictor in life insurance and annuities. It could be improved upon by the addition of other variables (age is another variable that is

already used, of course), but the reliable measurement of still other variables at an affordable cost is a difficult problem in trying to provide a more refined price structure. Given that fact, the use of age and sex alone, without more variables, in the pricing of life insurance and annuities is justified, though far from the ideal or final solution. It surely will not be the end of actuarial development in rate-making, however. Some insurers are now experimenting with smoking as a variable in life insurance pricing. Kimball, *Reverse Sex Discrimination: Manhart*, 1979 Amer. Bar Fnd'n. Res. J. 83, 119, fn. 96. If it is a practicable variable to use, that experiment will succeed in the free market. If it does, eventually insurance regulators will consider it unfair discrimination to fail to use it as a criterion.

In any event, solving the difficult problem of fair pricing of insurance and annuities is not one the Congress undertook in its rough first attack on unfair sex discrimination in employment, for the solution of this knotty problem was allocated to the states by the McCarran-Ferguson Act. It is a task to which the states have devoted and will devote a good deal of attention. The preferable outcome in the case of *Arizona Governing Committee* v. *Norris* is reversal of the Court of Appeals and District Court decisions and dismissal of the complaint of plaintiff Nathalie Norris.

Respectfully submitted,

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NO. 82-52

IN THE

Supreme Court of the United States

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ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL INSURANCE CONSUMER ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF NATIONAL INSURANCE CONSUMER ORGANIZATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is filed on behalf of the National Insurance Consumer Organization, as *amicus curiae*, in support of Respondents. Consent from counsel for both sides has been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The National Insurance Consumer Organization ("NICO") is a non-profit public interest membership organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. NICO publishes guides and offers advice to help consumers buy insurance wisely, and works for reform of unfair and anticompetitive insurance practices by participating in legislative and regulatory proceedings and through consultation and litigation. Its Board of Directors and staff possess extensive experience in insurance and related public policy matters. NICO's Board is composed of two former state insurance commissioners, one a life and health actuary and the other an attorney, and one former federal insurance administrator, a casualty actuary. The membership of NICO reflects the broad range of interests of the insurance buying public, which consists of virtually all American families. NICO'S members have an important stake in the outcome of this litigation in that they are adversely affected by insurers' practice of reliance upon gender-based classifications. Our female members are particularly adversely affected by the practices at issue in this case. One of NICO's major goals is the elimination of surrogate classifiers, such as gender, so that the industry has incentive to find real risk-related classifications.

INTRODUCTION

This Court held in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), that an employer-operated pension plan which required every woman to contribute 14.84 percent more out of her salary than every man in order to receive the same benefits upon retirement discriminated against women in violation of Title VII.[1] In the case now before this Court, Petitioners challenge the decision of the United States Court of Appeals for the Ninth Circuit[2] that the State of Arizona's practice of offering its employees annuity plans which pay lower monthly benefits to every woman than to every man retiring at the same age, per dollar contributed, violates Title VII. Petitioners raise two arguments before this Court. They argue first that because Arizona chooses to contract with private insurance companies

[1]Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*

[2]*Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *aff'g* 486 F. Supp. 645 (D.C. Ariz. 1980).

which employ sex-segregated mortality tables to provide annuity options, the State should not be held responsible under Title VII for the resulting difference in treatment of individual male and female employees. Second, Petitioners argue that the relief ordered by the courts below is an abuse of discretion. Significantly, Petitioners do not argue that the payment of lower monthly annuity benefits, per dollar contributed, to every woman than to every man based upon the presumption that women, as a class, live longer than men is distinguishable from the practice of requiring every woman to contribute more than every man so as to receive the same monthly benefits upon retirement.

The arguments of a number of *amici curiae* in this proceeding[3] stray far from the issues raised by Petitioners. Certain *amici* attempt to persuade this Court that the payment of lower monthly annuity benefits to every woman than to every man retiring at the same age does not discriminate on the basis of sex and should not be held to violate Title VII. They argue that the annuity plans offered under Arizona's deferred compensation program provide benefits to men and women that are "actuarially equivalent."[4] Some argue that reliance on the generalization that women, as a class, live longer than men cannot be said to discriminate against individual women because there is no way of knowing, at the time annuity benefits are calculated, which individual women will not fit the generalization.[5] In essence, certain *amici* attempt to reargue the relevance of actuarial concepts which were raised in the *Manhart*

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[3] *Amicus Curiae* briefs filed in this proceeding include: *Brief of American Council of Life Insurance as Amicus Curiae in Support of Petitioners ("ACLI Brief")*; *Amicus Curiae Brief of the National Association of Insurance Commissioners ("NAIC Brief")*; *Brief of Teachers Insurance and Annuity Association and College Retirement Equities Fund as Amici Curiae in Support of Petitioners ("TIAA-CREF Brief")*; *Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioners ("EEAC Brief")*; *Brief for the New York State Teachers' Retirement System as Amicus Curiae ("New York Brief")*; *Brief for Amicus Curiae The State of Florida ("Florida Brief")*; *Brief of American Academy of Actuaries as Amicus Curiae ("AAA Brief")*.

[4] *See, e.g., AAA Brief* at 11-16; *ACLI Brief* at 5, 8, 13-14; *NAIC Brief* at 23-25; *EEAC Brief* at 19-22.

[5] *See, e.g., AAA Brief* at 15; *ACLI Brief* at 4, 16; *EEAC Brief* at 18; *New York Brief* at 14.

case and which were rejected by this Court as irrelevant to Title VII analysis. Finally, some *amici* claim (and here they do echo the Petitioners' arguments[6]) that the use of sex-based classifications is necessary to the financial integrity of annuity plans and that affirmance of the decision of the Court of Appeals for the Ninth Circuit will severely disrupt or "revolutionize" the insurance industry.[7]

The purpose of our brief is to address the arguments of various *amici curiae* in this proceeding regarding the "actuarial fairness" of the Arizona annuity plans as well as *amici's* predictions that the insurance industry would be seriously disrupted by this Court's affirmance of the decisions below.

SUMMARY OF THE ARGUMENT

The actuarial arguments raised by *amici* in support of the sex-segregated annuity plans offered under Arixona's deferred compensation program are not distinguishable from those which this Court rejected as irrelevant in *Manhart*. Here, as in *Manhart*, the difference in the treatment of men and women is based upon the generalization that women, as a class, live longer than men. In *Manhart* that generalization was held not to justify a requirement that every woman contribute more than her male counterpart so as to receive the same benefit upon retirement. The Arizona annuity plans use that generalization to justify the practice of paying every woman a lower monthly annuity benefit than every man retiring at the same age, per dollar contributed. There is no principled distinction between the two practices which would allow the latter practice to be found acceptable under Title VII.

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[6] *See, e.g., Petitioners' Brief* at 9.

[7] *See, e.g., EEAC Brief* at 8-15; *NAIC Brief* at 4-9; *ACLI Brief* at 19-22. *Amici's* claim that affirmance of the Ninth Circuit's opinion will severely disrupt or "revolutionize" existing pension and annuity programs is no doubt intended to suggest that the opinions below are contrary to the following dictum in *Manhart:*

> Although we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries.

435 U.S. at 717. The quoted dictum merely emphasizes that the focus of Title VII is on employer-employee relations and that this Court's decision in *Manhart* was directed towards that relationship and not to insurance industry practices. The Ninth Circuit's holding that the State of Arizona may not offer its employees annuity options which provide different monthly benefit levels based on sex is not contrary to that dictum.

The concept of "actuarial fairness" is irrelevant under Title VII. "Actuarial fairness" relates to the average differences between the sexes as classes and not to the difference in life expectancies of men and women as individuals. The argument that annuity plans which use sex-segregated actuarial tables do not discriminate against individual women because they can "expect" to receive the same benefits as men, is based upon the false presumption, rejected in *Manhart*,[8] that all individuals of the same gender and age have the same life expectancy and so value a life annuity equally. The "actuarial fairness" arguments raised by various *amici* would also justify the use of race classifications. Neither race nor sex classifications are acceptable under Title VII.

Sex classifications in insurance serve as a proxy for other characteristics, for example, smoking, drinking and exercise habits, which are demonstrably related to mortality and longevity. Indeed, studies indicate that smoking has a more significant relationship to mortality and longevity than does sex.[9] As a result, the annuity plans do not treat men and women who are similarly situated (with regard to factors related to mortality and longevity) equally. Sex-based classifications in annuities treat every individual woman as though she possesses the characteristics of the "average woman." Individual women are injured by these presumptions. Women, as a class, may also be injured by presumptions about the characteristics of the "average woman" because mortality tables apply generalizations about the past behavior of women to current female annuitants.

Amici's arguments that the use of sex-based classifications is not unreasonable because they are easy to administer and less costly than alternatives are overstated and do not justify sex discrimination. The fact that a discriminatory practice may reduce an employer's costs or that its elimination may entail some expense is not germane. Title VII does not contain a cost-based justification. However, even if such considerations could justify discrimination in certain circumstances, those circumstances are not present here. Financially sound annuity and retirement plans

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[8]435 U.S. at 712.

[9]*See, e.g.*, Cowell and Hirst, Mortality Differences Between Smokers and Non-Smokers, 16, 19-20 (State Mutual Life Assurance Company of America, October 22, 1979) (reprinted at 32 Transactions of the Society of Actuaries 185 (1980)).

which do not use sex-based classifications are in use. Other individual characteristics which could be used as risk classifiers in annuities are used as such in other forms of insurance. Finally, the projected costs of equalizing benefits paid to men and women are overstated by the industry.

Even if valid actuarial data could justify differential treatment of men and women, the annuities offered by Arizona should be held discriminatory. These annuities base their payments to women not on female mortality rates but on a crude adjustment of male mortality rates, one applied inconsistently as between insurers participating in the Arizona program. Comparison of these adjustments with similar adjustments made in the life insurance context suggests that this unscientific process is employed in a discriminatory manner.

Amici's attempts to sway this Court by arguing that affirmance of the Ninth Circuit's decision that Title VII prohibits employers from offering annuities which provide lower monthly payments to every woman than to every man of the same age, per dollar contributed, will seriously disrupt or "revolutionize" the insurance industry must also be rejected. These claims are exaggerated and lacking in factual support. Moreover, *amici's* claims about the possible effect of this Court's decision on the insurance industry in general are irrelevant to Title VII analysis. Title VII governs the relationship between employers and employees. The decision below addresses only that relationship.

ARGUMENT

I. THE ACTUARIAL ARGUMENTS OFFERED TO SUPPORT THE USE OF SEX-BASED MORTALITY TABLES IN THE ARIZONA ANNUITY OPTIONS ARE NOT DISTINGUISHABLE FROM THOSE WHICH THIS COURT REJECTED IN LOS ANGELES DEPARTMENT OF WATER & POWER v. MANHART[10]

The annuities offered under Arizona's deferred compensation plan provide lower monthly benefits to women than to men per dollar contributed. That difference is based solely upon the generalization that women, as a class, live longer than men. Certain *amici curiae* argue that this sex-based classification should not be held to violate Title VII because it is based on valid

[10] 435 U.S. 702 (1978).

actuarial principles. A principal argument is that annuity plans of the type offered by Arizona do not discriminate because they provide men and women benefits which are "actuarially equivalent."[11] That argument is offered both as a justification for the practice and as a reason for distinguishing the issues in this case from those addressed in *Manhart*.[12] Because *amici* suggest that the actuarial justifications for the differential treatment of men and women apply differently to the facts of this case than they did in *Manhart*, it is important to compare the two cases at the outset of this discussion.

In *Manhart*, this Court addressed the question of whether an employer-operated pension plan that required women to contribute 14.84% more out of their salaries than men in order to receive the same monthly pension benefit violated Title VII. The Department's practice of requiring different contributions from men and women was based upon the presumption that because women, as a class, live longer than men, it is more costly to provide the same pension benefits to women.[13]

This Court accepted as true the generalization that women, as a class, live longer than men,[14] but nonetheless found that the pension plan discriminated against women in violation of Title VII. In so doing, the Court emphasized that the Congressional purpose underlying Title VII is to proscribe classifications based on race, color, religion, national origin or sex.[15] Title VII's prohibition against such classifications is intended to protect the individual. As a result, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to

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[11] *See, e.g., AAA Brief* at 11-16; *ACLI Brief* at 5, 8, 13-14; *EEAC Brief* at 19-22; *NAIC Brief* at 23-25.

[12] For example, *amicus* EEAC argues that the discriminatory result of the use of sex-differentiated mortality tables in *Manhart* was that women received less take home pay because they were required to purchase annuity plans of greater actuarial value than were men. EEAC argues that the use of sex-differentiated tables in the Arizona annuity offerings is different because it resulted in men and women receiving benefits which have the same present value. *See EEAC Brief* at 17-19. That distinction was discussed and rejected in *EEOC v. Colby College*, 589 F.2d 1139, 1144 (1st Cir. 1978).

[13] *Manhart*, 435 U.S. at 705.

[14] 435 U.S. at 709.

[15] The Court observed that: "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." 435 U.S. at 709.

whom the generalization does not apply." 435 U.S. at 708.[16]

The Court empnasized in *Manhart* that: "[t]here is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based." 435 U.S. at 708. The Court therefore held that the Los Angeles pension plan discriminated against individual women by treating them as though they possessed the characteristics of the "average woman."

The annuity plans offered by the State of Arizona depend upon the same factual generalization the use of which the Court forbade in the *Manhart* case; that is, that because women, as a class, live longer than men, it is more costly to provide women the same annuity benefits. The actuarial principles relied upon for cost prediction are also the same. The only distinction lies in the manifestation of the predicted cost differential. Under Los Angeles' pension plan, the presumed cost differential between men and women was manifested in the requirement that every woman contribute more than every man in order to receive the

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[16]Thus, employers may not employ only men to perform jobs involving heavy work upon the assumption that women are physically unsuited for such jobs. *See, e.g., Rosenfeld v. Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969). Similarly, employers may not refuse to hire men as flight cabin attendants because of their belief that women are better able to provide comfort to passengers *(See Diaz v. Pan American World Airways Inc.,* 442 F.2d 385 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971), or reject applications from women with preschool-age children based on the assumption that women's family obligations are more relevant to job performance than men's. *See Phillips v. Martin Marietta Corporation,* 400 U.S. 542 (1971).

Insurers' reliance on generalizations about female and male mortality to support the differential treatment of women is equally offensive under Title VII. This Court has rejected the view that sex-based classifications used by insurers should be evaluated differently than other sex-based classifications for the purpose of Title VII analysis. The Court stated in *Manhart* that:

> [T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII.

435 U.S. at 710. Thus, insurers' claims that they must use some form of risk classification in annuity plans do not justify the use of sex as a classification where individual women receive smaller monthly benefits as a result.

same monthly benefits upon retirement. Under the annuity plans offered by Arizona to its employees that presumed cost differential results in smaller monthly annuity benefits to every woman than to every man per dollar contributed. This is a distinction without a difference.

The Arizona annuities provide lower monthly benefits to every woman, assuming that each is likely to live as long as the "average woman" and, therefore, longer than the "average man." Thus, once she retires, a woman will receive smaller monthly benefits, regardless of how long she actually lives, than she would if she were a man. The nature of the discrimination against individual women is, therefore, the same as that which this Court held in *Manhart* violates Title VII.

NICO believes that this Court's decision in *Manhart* controls the legality of Arizona's annuity offerings and that *amici's* arguments supporting the use of sex classifications based on actuarial principles are irrelevant under Title VII. Nonetheless, because such arguments have been brought to the attention of this Court, we believe it is appropriate to address them and to demonstrate why they should be rejected.

II. THE ARIZONA PROGRAM VIOLATES TITLE VII BECAUSE IT DISCRIMINATES AGAINST WOMEN

A. The "Actuarial Fairness" of A Retirement Plan Is Irrelevant Under Title VII.

1. Defenses of sex-segregated retirement plans relying on the expected value of future benefits to the individual retiree ignore the variation in life expectancy among individuals of the same gender and age.

Several *amici* urge this Court to employ the concept of "actuarial fairness" in analyzing the legality of a retirement benefit plan under Title VII, and to hold that a program which is "actuarially fair" to men and women does not discriminate against women, even though a woman will get less money per month than a man who retires at the same age with the same amount of equity in the plan.[17] The Court rejected this approach in *Manhart*. This rejection was proper and ought to be maintained, because "actuarial fairness" relates to fairness to classes, but not individuals, whereas Title VII requires fair treatment of individuals.

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[17] *ACLI Brief* at 13-14; *NAIC Brief* at 22-25; *TIAA-CREF Brief* at 22; *EEAC Brief* at 23-25. *See also AAA Brief* at 10, 12.

It is argued that annuities which classify individuals by sex and age do in fact treat *individuals* fairly because men and women, with their different life expectancies, can *expect* to receive a stream of payments of equal value from their annuities.[18] This "expectations" argument is fallacious. The source of the fallacy is the presumption that all individuals of like gender and age have the same life expectancy and so value a life annuity equally.[19] When this presumption is discarded, analysis of sex-segregated retirement plans clearly reveals their discriminatory nature. The actuarial fairness of a sex-segregated retirement plan bears no necessary relationship to the difference between the life expectancies of individual men and women; rather it is related to average differences between the sexes as classes, *i.e.*, to stereotypes.[20] Furthermore, sex-segregated plans make demonstrably false presumptions concerning individuals based solely upon their sex. For both of these reasons, sex-segregated retirement plans are unfair and discriminatory under an "expectations" analysis, just as under the "actual longevity" analysis adopted in *Manhart*.[21]

2. The annuities in the Arizona program do not treat similarly situated men and women fairly in accordance with their respective life expectancies.

The irrelevance of the actuarial fairness of a classification for the purposes of Title VII may best be illustrated with a purely hypothetical example. Suppose that hypertension is far more prevalent among Lutherans than among Presbyterians. Further, suppose that there is no other difference between Lutherans and

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[18] *ACLI Brief* at 14; *AAA Brief* at 10; *EEAC Brief* at 19-20. The argument is presented in more detail in Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. Chi. L. Rev. 489, 496-98 (1982).

[19] This claim, or the related one that *all* women can expect to outlive the average man of the same age, is made in a number of briefs. *See, e.g., Petitioners' Brief* at 5; *ACLI Brief* at 15; *EEAC Brief* at 10; *TIAA-CREF Brief* at 22. In fact, many factors affect individual life expectancy; among the more obvious are smoking, drinking, eating and exercise habits, presence of chronic heart disease, diabetes or hypertension, and family history. *See Manhart*, 435 U.S. at 712.

[20] A stereotype may be true or false as applied to a class, but such truth or falsity is not relevant under Title VII. *Manhart*, 435 U.S. at 707-08.

[21] *See Manhart*, 435 U.S. at 707-08, 710 n.20.

Presbyterians that affects mortality, so that a group of Lutherans suffering from hypertension and a group of Presbyterians suffering from hypertension would have very similar average life expectancies, as would groups of Lutherans and Presbyterians not suffering from hypertension. Because hypertension shortens life expectancy, and because Lutherans tend to suffer from hypertension more than Presbyterians, we would find that Presbyterians, as a class, live longer than Lutherans.

If actuaries were to look for a relationship between religious affiliation and longevity, they would discover that Presbyterians live longer than Lutherans. They would conclude that it would be actuarially fair to charge Presbyterians more than Lutherans for identical life annuities because Presbyterians will live to collect more money under those annuities. Were this to be done, Presbyterians and Lutherans with hypertension would have the same life expectancies, yet the Presbyterians would receive lower periodic benefits under the "actuarially fair" retirement plan. The same would be true of Presbyterians and Lutherans without hypertension. Thus, *similarly situated* Presbyterians and Lutherans[22] would be treated differently solely on the basis of religion, although as classes Presbyterians and Lutherans would be treated "equally" since the lower monthly payments to Presbyterians would be offset by the greater average longevity of all Presbyterians.

Under these circumstances, Title VII would prohibit an employer from offering higher monthly retirement payments to Lutheran employees than to Presbyterian employees despite the "actuarial fairness" of such treatment. The retirement program would be less valuable to a Presbyterian than to a similarly situated Lutheran, a clear example of discrimination forbidden by Title VII.[23] The violation of Title VII in this hypothetical is similar to that in *Connecticut v. Teal*, ____ U.S. ____, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982), where the Court held that a black job applicant whose application was rejected because he did not pass an allegedly racially discriminatory exam could maintain an action against the employer under Title VII even

[22] *I.e.*, Presbyterians and Lutherans not differing in respects (other than religion) associated with life expectancy.

[23] Title VII requires that "similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977). *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

though the employer's hiring process considered as a whole had no adverse impact upon blacks. The Court's decision in *Connecticut v. Teal* reemphasizes that the focus of Title VII is fairness to the individual.

The hypothetical example illustrates that the actuarial fairness of a retirement plan relates to the aggregate treatment of classes, but has no necessary relevance to the fair treatment of similarly situated individuals. This is because the trait which is the basis for the classification (religious affiliation in the above example) may be a mere proxy for a casually relevant trait (hypertension in the above example) that is *not* shared by all of the individuals in the actuarially defined class. As the National Association of Insurance Commissioners emphasizes *(NAIC Brief* at 27), actuaries are concerned with correlation and cost prediction — causality is not a major concern.[24] In *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), an employer was forbidden to use sex as a predictor of job-effectiveness even though sex was found by the District Court to be the best predictor of the presence of those qualities that would contribute to superior performance. It is no more permissible to use sex to predict the presence of qualities contributing to greater life expectancy.

The proxy problem is not merely hypothetical, for it is present in the instant case. As this Court noted in *Manhart*, social factors such as smoking, drinking, and eating habits affect the differential between male and female life expectancy.[25]

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[24] *See also Nondiscrimination in Insurance: Hearings on H.R. 100 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 194-95 (1980) (hereinafter referred to as *"1980 Hearings"*) (prepared testimony of Charles C. Hewitt, Jr. on behalf of the Risk Classification Committee of the American Academy of Actuaries).

[25] *Manhart*, 435 U.S. at 709-710 & n.17. Smoking habits are especially significant in this regard. Through most of the 1950's and 1960's, about one-half of all adult American men smoked, as opposed to only about one-third of adult American women. U.S. Surgeon General, *Smoking and Health* (1979), Appendix, Table 1, p. 9. Studies indicate that smoking habits have a greater impact on mortality than does gender, and so are a better predictor of longevity. *See, e.g.*, Cowell and Hirst, *Mortality Differences Between Smokers and Non-Smokers* 16, 19-20 (State Mutual Life Assurance Company of America, October 22, 1979) (reprinted at 32 Tranactions of the Society of Actuaries 185 (1980)). Cowell and Hirst, at page 21 of their paper, reported evidence indicating that the higher smoking rate of men does in fact result in overstating the underlying mortality differential between the sexes, for the differential is smaller in a subgroup of male and female policyholders with more similar smoking habits.

Occupation, although not specifically mentioned in *Manhart*, is another social factor which affects the differential between male and female life expectancy.[26] Because gender serves at least in part as a proxy for these other characteristics, the sex-differentiated actuarial tables do not reflect the relative life expectancies of similarly situated men and women. Thus, the annuity rates based upon those tables discriminate against women because they penalize women for differences in life expectancy over and above those which may be attributable to sex alone.[27] Actuarial fairness, then, does not justify the facial gender discrimination present in an employee annuity plan which penalizes all women because the average women of a given age will, for reasons known and unknown, outlive the average man of that age.

Because there is much that is unknown about determinants of longevity, it is impossible to say what the effect of sex might be on life expectancy, all other things being equal. We do not know what to hold equal; we do not know how to define "similarly situated men and women." *Amici* differ among themselves as to whether taking more variables into consideration would lead to a narrowing or a widening of the differential between rates for men and women otherwise identical in all respects under consideration.[28] Evidently, there are as many "actuarially fair"

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[26] *See* Anderson, *A Critique of the Manhart Brief*, The Actuary, May 1978, at 5, which, in addition to noting that occupation is an important factor affecting mortality, states that a 1976 paper by John M. Bragg presented to the Twentieth International Congress of Actuaries (Tokyo, 1976) implies that socio-economic class is at least as significant a factor as sex. Occupation is related to socio-economic class.

[27] For example, it can be inferred that a female non-smoker would receive payments of lower value over her lifetime from an annuity offered through the Arizona program, than would a male non-smoker, were each to live as long as the average non-smoker of their respective genders.

[28] NAIC states (*NAIC Brief* at 26) that the addition of other classifications would reduce but not eliminate the effect of sex on mortality. The Academy states (*AAA Brief* at 14 n. 16) that a study reported by Dr. D.L. Wingard found that the "difference in relative mortality risk for men and women" increased when a statistical technique was used to control for the effect of certain other demographic and behavioral factors. In fact, the cited report indicates that the statistical adjustment increased the *ratio* of relative mortality risk of men to that of women, but gives no indication whether the increase is statistically significant. Furthermore, the reliability of the statistical technique used in that study has been questioned. *See* Gordon, *Hazards in the Use of the Logistic Function With Special Reference To Data From Prospective Cardiovascular Studies*, 27 J. Chronic Diseases 97 (1974).

sex differentials as there are classification schemes, and when more classifications are used the system is "more fair." *See NAIC Brief* at 26. The Court should not sanction a mode of Title VII analysis in which fairness is so fluid a concept.

To conclude, the premise of the expectational argument that actuarially fair sex-segregated annuities do not discriminate against individual women is that women have greater life expectancies than do similarly situated men and for that reason can expect to receive lower periodic life annuity benefits for a longer time. This premise has been shown to be false, or at least suspect, for actuarial fairness to groups does not bear on equality of treatment of similarly situated men and women. Therefore, the expectational argument has no weight, and there can be no justification for the facial discrimination present in sex-segregated annuity plans such as those offered through the Arizona program.

3. The annuities in the Arizona program make impermissible presumptions concerning individuals on the basis of sex.

The proxy problem explained in the previous section has demonstrably discriminatory impact on identifiable individual women. The discrimination arises because sex-segregated retirement plans implicitly attribute characteristics to all presently covered women solely because in the past more women than men tended to have those characteristics. This is most easily illustrated by considering smoking behavior. The mortality tables used by insurers reflect the fact that when most actuarial tables were designed, a substantially larger percentage of men that women smoked.[29] The effect on mortality of this difference in smoking behavior is incorporated into the annuity plans offered by the insurer through the size of the female setback. Thus, the annuity plan implicitly says to ev ry women, "You will receive a lower monthly payment than you otherwise would because, as a woman, it is less likely that you smoke than that the average annuitant smokes." This presumption is applied to every woman solely because she is a woman, regardless of its accuracy. The female retiree who smokes two packs a day has no opportunity to get her benefits increased by proving that the presumption which the plan makes about her smoking habits

[29] *Supra* note 25, at 12.

because she is female is wrong. This is classic discrimination: the use of gender to predict or replace consideration of an individual's actual relevant traits. It is no different from using gender to predict an individual's ability to perform strenuous work.

An annuity plan using only age classifications, of course, would implicitly treat all men and women as though they were as likely as the average person to exercise regularly, smoke, or drink excessively. This treatment would be incorrect in many individual cases, but it would *not* be a false characterization made on the basis of a person's sex. By making no gender classification, a unisex pension plan avoids making any false judgments about an individual *on account of the individual's sex.* It errs, but in a sex-blind fashion. Therefore, unisex plans, but not sex-segregated plans, pass muster under Title VII.

Women as a class can be injured by presumptions built into the sex-segregated tables as well. For example, the difference between male and female smoking rates has narrowed dramatically in recent times.[30] According to the stipulations, at least one of the annuities offered through the Arizona program uses mortality tables published in 1971. Use of such out-of-date statistics overpenalizes today's women in this respect by ignoring their increased propensity to smoke. Thus, by classifying annuitants by gender but failing to classify annuitants in accordance with their smoking habits, the Arizona program actually penalizes women *as a class* as well as individually. Again, while this is demonstrably true with respect to smoking, it may be true as well with respect to other factors for which gender serves as a proxy.

4. Sex classification in employee insurance benefits is no more "fair" than race classification would be; both are prohibited by Title VII.

Leading commentators on both sides of the argument regarding the acceptability of sex classifications in employee benefit plans agree that sex classifications are, in principle, neither more nor less defensible than race classifications would be.[31] The actuarial arguments now raised in support of sex

[30] *Smoking and Health, supra* note 25, at 12, Appendix, Table 1, p. 9.

[31] *See* Brilmayer, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis,* 47 U. Chi. L. Rev. 505, 536-39, (1980) (hereinafter cited as *"Brilmayer"*), arguing that sex classifications, like race classifications, are impermissible, and Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited,* 49 U. Chi. L. Rev. 489, 511-12 (1982), arguing that race classifications, like sex classifications, should be permissible.

classifications in insurance were once raised to defend the insurance industry's use of race classifications.[32] The insurance industry's explanations of why it can no longer justify the use of race classifications further undercut claims that sex classifications are legitimate. There are three explanations for the absence of racial classifications from modern insurance policies: that race is not a good predictor of longevity, that race is a mere proxy for other factors, and that race is not a socially acceptable classification.[33] Closer examination reveals that only the third explanation represents a plausible distinction between race and sex classifications. That distinction is clearly irrelevant under Title VII.

One explanation for the absence of racial classifications from retirement programs is: "there is now no substantial difference between the mortality rates of whites and non-whites at the older ages. However, there continues to be a disparity between the life expectancy of non-white males and non-white females, just as there continues to be a disparity in the life expectancy of white males and white females."[34] This statement is revealing in light of its qualification. Non-white mortality rates are substantially higher than white mortality rates at lower ages,[35] yet the industry does not discriminate on the basis of race in life insurance or

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[32] *See* S. Rep. No. 671, 97th Cong., 2d Sess. 5-6 (1982). The Senate Report states, at 5, that:

> [I]n its announcement of March 10, 1881, that policies on "colored lives" would have two-thirds face value of policies on white lives for the same premium, the Prudential Insurance Company contended that its action:
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> > ... was not only justified, but necessary for its own safety and equity to the white policyholders, who as a class are subject to a mortality less than two-thirds as high as the rate prevailing among the colored people.

[33] *Id.* at 7.

[34] *1980 Hearings* at 197 (statement of Charles C. Hewitt, Jr.).

[35] *Id.*, at 166, 241. The table "Expectation of Life at Various Ages in the United States 1977" (Source: National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare) (*1980 Hearings* at 245) shows that life expectancy for non-whites is lower than that of whites at ages up to age 70. At many age levels, there is a greater difference between black and white mortality rates than between male and female mortality rates. S. Rep. No. 671, 97th Cong., 2d Sess. 7 (1982).

death benefit plans. Thus, there must be some other explanation for the absence of racial classifications.

The second explanation for the non-use of race as a classification is that "race is actually a surrogate for other factors: diet, housing, medical care, education, and employment opportunities."[36] This explanation is quite curious, because in defending plans which employ sex classifications insurers insist that the use of sex as a cheap proxy for other factors is a legitimate actuarial practice and that causality is unimportant.[37] In any case, actuarial data does not purport to separate intrinsic effects of factors from proxy or surrogate effects. There is no convincing actuarial evidence that gender *per se* is more determinative of mortality risk than race *per se*.

The third explanation for the non-use of race as an actuarial classification, and the only plausible one, is that race classifications are no longer socially acceptable. "Laws, regulations and public opinion all constrain risk classification systems within broad social acceptability guidelines."[38] As this Court noted in its decision in *Manhart*, "[a]ctuarial studies could unquestionably identify differences in life expectancies based on race or national origin as well as sex." 435 U.S. at 709 (footnote omitted). However, Congress has made the decision that "classifications, based on sex, like those based on national origin or race, are unlawful." *Id.* Neither race nor sex classifications in annuity plans are acceptable under Title VII.

B. Arguments that the Use of Sex-Based Classifications Is Not Unreasonable Because Alternatives Are More Difficult or Expensive to Administer Are Overstated and Do Not Justify Discriminatory Treatment.

Sex is the *sole* classification, other than age, used in the Arizona annuity plans to predict longevity. Yet, insurers and actuaries generally acknowledge that a number of characteristics

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[36] *1980 Hearings* at 196 (statement of Charles C. Hewitt, Jr.)

[37] *Id.* at 195 (statement of Charles C. Hewitt, Jr.), 228-29 (American Academy of Actuaries Comm. on Risk Classification, *Risk Classification: Statement of Principles*).

[38] *Id.* at 228.

other than sex are statistically related to mortality.[39] Behavioral and social factors statistically related to mortality include smoking habits, physical condition, geographic location, family history, and recreational and occupational activities.[40] Certain racial and religious classifications are also statistically related to differences in mortality rates at some ages.[41] The Arizona annuity options' use of sex as the only risk classification, other than age, must be questioned in light of the knowledge that alternative classification systems are available (*i.e.*, those which use only age or which also use classifications that are not proscribed by Title VII).

Those who defend the use of sex-segregated mortality tables claim that sex possesses certain advantages over other characteristics as an actuarial classification; *e.g.*, that sex mortality differences appear to be stable over time[42] and that sex is a reliably and inexpensively determined characteristic.[43] The social and behavioral factors for which sex classification now serves as a proxy, the argument continues, cannot be used directly because they are expensive to ascertain reliably and are imprecise.[44]

None of these arguments provides sufficient reason for this Court to carve out an exception from Title VII's proscription

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[39] *See, e.g., NAIC Brief* at 26-27; *see also Nondiscrimination in Insurance Act of 1981: Hearings on H.R. 100 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 79 (1981) (written statement of B.J. Lautzenheiser on behalf of the American Council of Life Insurance and the Health Insurance Association of America) (hereinafter *"1981 Hearings"*); *id.* at 131 (written statement of S.R. Woodall, Executive Vice President, National Association of Life Companies).

[40] *1980 Hearings* at 1968. (statement of Rep. Dingell, sponsor of H.R. 100).

[41] For example, Mormons and Seventh Day Adventists, as a class, have longer life expectancies than the general population of the United States. Jews, as a class, have a shorter life expectancy at age sixty-five than the total population at that age. *1980 Hearings* at 165.

[42] The current claim that sex mortality differences appear to be stable over time is questionable in light of insurers' acknowledgement of and explanation for the fact that insurers did not differentiate life insurance premium rates by sex prior to the 1950's. One explanation given is that "the mortality differential was significantly smaller then than it is now..." *1980 Hearings* at 93 (written testimony of B.J. Lautzenheiser on behalf of American Council of Life Insurance and Health Insurance Association of America).

[43] *See, e.g., NAIC Brief* at 26-27.

[44] *Id.*

against differential treatment based on sex. Title VII does not allow alleged considerations of convenience and administrative efficiency to serve as justifications for sex discrimination. Even if cost were relevant, no necessity for using sex classifications has been shown to exist. The asserted advantages of using sex as a classification relative to other factors are greatly overstated. Moreover, financially sound retirement plans exist which do not use sex-segregated mortality tables.

The argument that the use of sex as a classifier is justified because sex is an inexpensively and conveniently determined characteristic deserves little weight in light of Title VII's proscription against sex discrimination. Title VII does not contain a cost-based justification. The fact that a discriminatory practice may reduce costs or that its elimination may entail some cost is no defense. It may well be less costly to exclude all women from jobs requiring unusual strength than to test each individual applicant. Nonetheless Title VII may require that an employer must test applicants in order to treat individual women fairly.[45]

No need exists to use sex-based classifications in setting annuity and pension benefit levels. Almost all defined benefit pension plans and group insurance plans, including the Federal Government's Civil Service Retirement System, are gender-neutral.[46] Indeed, Arizona's State retiremen. plan is among these.[47] The principal objection given by insurers to the use of gender-neutral plans is that they would be more costly because overall benefit levels would be increased.[48] In fact, estimates vary of the additional cost per year which might be incurred under gender-neutral plans. According to ACLI, "an internal study conducted by the Council estimates that a prohibition against

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[45] *See Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *see also Rosenfeld v. Southern Pacific Company*, 444 F.2d 1219 (9th Cir. 1971). This Court has repeatedly rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications under an Equal Protection Clause analysis. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 143, 150-52 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

[46] *1981 Hearings* at 28 (Statement of Rep. Dingell, sponsor of H.R. 100).

[47] *Petitioners' Brief* at 3 n.4.

[48] *See, e.g., ACLI Brief* at 3.

using sex-specific actuarial tables would increase the cost of retirement plans by about two billion dollars per year.'[49] By contrast, a United States Labor Department cost study of "topping up" under the Equal Employment Opportunity Act indicates that the unfunded liability for private pension plans is expected to be under $500 million.[50] That unfunded liability compares to industry assets and reserves of over $400 billion.[51]

Sound annuity plans can be developed using no classifications, other than age, or by using a wide variety of other unforbidden characteristics for classifying risks. *Amici* argue, however, that the use of other characteristics, such as smoking habits and health, as risks factors would be too unreliable or expensive. There is little merit to that argument. It is undisputed that insurance companies routinely use such factors in pricing other forms of insurance.[52] For example, the American Academy of Actuaries states that "[o]ffering lower premiums to nonsmokers is now a widely used life insurance practice." *AAA Brief* at 14 n.17.[53] Substandard rates in life insurance have been developed for physical criteria such as obesity and hypertension,[54] and other factors such as occupation. A Statement of Principles regarding

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[49] *Id.* In making this estimate, ACLI assumed that the equalization of benefits payments between individual men and women would be accomplished by increasing, in the case of each benefit that might be paid under a retirement plan, the amount of the lower benefit (payable to retirees of one sex or the other) to the level of the higher benefit (payable to the opposite sex). This approach is sometimes referred to as "topping up." The cost estimates would be lower if it were assumed that other methods of equalizing benefits would be used.

[50] Cited in Senate Comm. on Commerce, Science and Transportation, Fair Insurance Practices Act, S. Rep. No. 671, 97th Cong., 2d Sess. 18 (1982).

[51] *Id.* Thus, even the Academy's estimate of 2 billion dollars is only one-half of one percent of industry assets and reserves.

[52] This fact is acknowledged by several *amici curiae*. *See ACLI Brief* at 11-12 n.2; *AAA Brief* at 14 n.17; *EEAC Brief* at 21 n.12.

[53] Given its acknowledgment of that fact, the Academy's conclusion that the use of factors such as smoking habits in risk classification for *annuity* plans is prohibitively difficult because "persons who smoke heavily may deny it" *(id.* at 13) seems curious.

[54] *1980 Hearings* at 141 (statement of B.J. Lautzenheiser on behalf of American Council of Life Insurance and Health Insurance Association of America).

risk classification prepared by the American Academy of Actuaries Committee on Risk Classification and submitted as testimony in Congressional hearings acknowledges that occupation and geographic location, as well as sex and age, are examples of factors that are generally reliably determinable.[55] Moreover, research indicates that at least one factor — smoking — has a more significant statistical relationship to mortality than does sex.[56] Arguments that use of sex as a risk classification is necessary, and therefore permissible under Title VII, must be rejected.[57]

C. The Method Used by Insurers to Reflect in Their Rates the Mortality Differences Between Men and Women Is Imprecise and Is Applied in A Manner that Is Inconsistent and Appears to Be Discriminatory.

Reliance on statistical data appears to lend a certain credibility to the practice of sex classifications in annuities by suggesting that factors used for risk classification are objective and accurate. For example, *amicus* TIAA-CREF states that: "[t]he factors taken into account in classifying risks for annuities are those that are stable, significant and objectively measurable." *TIAA-CREF Brief* at 6. However, risk classification is by no means an objective science. It involves a substantial degree of judgment, from the selection of actuarially relevant risk classifications[58] to the construction of mortality tables based on those classifications.

There are numerous inaccuracies in the manner in which sex-segregated mortality tables are derived and applied. Moreover, those inaccuracies frequently work to the detriment of women and sometimes men, both as individuals and as classes. Such inaccuracies raise serious doubts about the "fairness" of using sex-based mortality tables and further support the conclusion that actuarial statistics cannot justify the facially discriminatory treatment of women under the Arizona annuity offerings.

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[55]This Statement of Principles is reprinted in the *1980 Hearings* at 226.

[56]*See, supra* note 25, at 12.

[57]We concur with the American Council of Life Insurance that "it would undoubtedly be impermissible to base an employment related decision on a characteristic related to an employee's sex if an alternative criterion was easily available." *ACLI Brief* at 18.

[58]*1980 hearings* at 214 (Risk Classification: Statement of Principles).

Our observations regarding the insurance industry's inconsistent and inaccurate use of the statistical data in creating sex-segregated mortality tables are not intended to suggest that paying women smaller monthly benefits than men would be justified under Title VII if the tables more accurately reflected actual mortality experience. As this Court clearly stated in *Manhart*, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. at 708. In addition, the infirmities of the "actuarial fairness" approach discussed earlier in this section would remain. However, if the use of true generalizations does not justify facially discriminatory treatment, surely the use of inaccurate generalizations is impermissible.

The inaccuracies in the insurance industry's use of sex-segregated mortality tables become apparent when one considers the manner in which the tables are derived. Although separate tables for each sex could be constructed based upon actual mortality data, very few insurers, and none involved in the Arizona program, do so. The more common technique, that actually used by all insurers in the Arizona program,[59] involves constructing a mortality table for men, based on actual experience, and then applying that table to women after subtracting a fixed number of years from each woman's age.[60] This technique is known as "setting back" the male table.[61]

The use of setbacks is, at best, a crude approximation for actual experience. The statistical difference between the life

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[59]Some of the Arizona annuity plans instruct the user to employ a specific setback. Others provide tables with separate columns for ages, one labelled "Male" and the other "Female." A third column lists the amount of annuity. By subtracting the age in the male column from the age in the female column on the same line, the number of years of setback may be determined. Thus, although the stipulation recites that "Lincoln National ... uses no 'setback', but rather has separate tables for males and females" (J.A. 12), the table of rates included in Arizona's contract with Lincoln National shows a difference in benefits equivalent to a setback of four years on the male tables at ages 50 to 75 (Ex. 3, Article 2.07).

[60]This practice is common despite the fact that both male and female tables are available. *See, e.g.*, Fellers and Jackson, *Noninsured Pensioner Mortality: The UP-1984 Table*, 25 Proceedings, Conference of Actuaries In Public Practice 456, 459 (1976).

[61]The use of setbacks from the male table for calculating benefits for females is the technique used by most insurers. *Brilmayer* at 506.

expectancies of men and women varies from age to age and tends to decrease with age, including ages after sixty.[62] Thus, the use of a fixed number as a setback for sex to calculate the level of periodic benefits, regardless of the age of the annuitant upon retirement, does not and cannot accurately reflect the statistical data the industry presents as a justification for the differential treatment of men and women.[63]

The crudeness of the approximations used by insurance companies as setbacks for calculating periodic payments to female as opposed to male annuitants is also evident from the fact that setbacks vary between companies. The record in this case shows that three different fixed setbacks were used by the annuity companies involved in the Arizona program. The parties to this proceeding have stipulated that:

> National Investor uses the annuity table based on male mortality tables exclusively with a six year "setback" for females. "Setback" as used here means the real age of a female is reduced six years. Thus a 65 years old woman is treated as being 59 years old and her monthly annuity based on that age, while a 65 years old male has his monthly annuity based on age 65.

(J.A. 12). The amount of the setbacks used by the other insurance companies is readily determined from the face of each policy. The Variable Annuity Life Insurance Company contract shows a setback of four years from beginning payout ages 55 to 75 (Ex. 5 at 5); the ITT Life Insurance Corporation shows a setback of five years from beginning payout ages 21 to 80 (Ex. 7 at 8-10).

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[62] *See 1980 Hearings* at 245 (Expectation of Life at Various Ages In the U.S. in 1977 (Source: National Center for Heath Statistics, U.S. Dept. of Health, Education and Welfare)). *See also Brilmayer* at 530 n.117.

[63] Not long after this Court's decision in *Manhart*, the insurance industry set up a committee to consider whether a separate mortality table, based on female lives, should be created for life insurance purposes. In July, 1979, a committee of the Society of Actuaries circulated to its members a report stating that "a single age setback cannot approximate the male-female mortality differential across the entire spectrum of ages" and recommended the creation of a female mortality table. The report, entitled "Recommendation to the Board of Governors of A New Minimum Mortality Standard for the Valuation of Individual Ordinary Life Insurance" (on file with the EEOC), is due to be published in a forthcoming issue of the Transactions of the Society of Actuaries.

Thus, under the Arizona deferred compensation program, a given woman selecting an annuity option could be considered to have the same life expectancy as a man four, five or six years her junior. The "actuarially fair" difference in payments between that woman and a man of the same age thus depends upon the woman's choice of an insurance company and not at all upon her individual characteristics or her identity as a member of the class of women.

Another, more blatant inconsistency in the insurance industry's use of setbacks is revealed by a comparison of the setbacks used by insurance companies in calculating life insurance premiums and those employed in calculating periodic annuity payments. In setting premiums for life insurance policies, insurance companies typically employ a setback of three years.[64] However, in calculating periodic annuity payments, insurance companies (often the same companies) use a larger setback, traditionally six years.[65] The use of a smaller setback in setting rates for life insurance than rates for annuities is curious when one considers that the current difference in life expectancy of men and women of the same age is higher at earlier ages, when most people purchase life insurance, than it is at later ages, when annuity payments begin.[66] Improper use of actuarial evidence

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[64] *See NAIC Brief* at 25. *See also 1980 hearings* at [illegible] (written statement of D.A. Steele, Staff Counsel, Women's Rights Project, American Civil Liberties Union); *Brilmayer* at 530 n.117. A 1979 report of a committee of the Society of Actuaries concluded that the only ages at which a three-year setback could be deemed proper are ages 40-42. *See supra* note 63, at 23.

[65] *See NAIC Brief* at 25. It is also standard industry practice to apply different mortality tables to the same individual in pricing life insurance than in calculating annuity benefits. *See* McGill, *Fundamentals of Private Pensions* 335 (4th ed. 1979).

> For example, at age 30, the 1958 C.S.O. Table is used to charge premiums for a female under a life insurance policy on an assumed mortality rate of 199 deaths per 10,000, while payout rates on an annuity contract for the same person are computed on the 1971 I.A.M. Table which shows a mortality rate of 47 deaths per 10,000 at that age ... In addition, the data generally used is in dollars of exposure, rather than numbers of individual deaths, a method which further distorts sex mortality rates since males carry at least 10 times the amount of insurance that females carry.

1981 Hearings at 29 (written statement of Rep. Dingell) (footnote omitted).

[66] *See 1980 Hearings* at 245 (Expectation of Life at Various Ages in the United States in 1977 (Source: National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare)). *See also Brilmayer* at 530 n.117.

would inure to the benefit of insurance companies, allowing them to charge women higher rates for life insurance and pay them lower monthly annuity benefits than that evidence would support. Indeed, *amicus* NAIC concedes that the difference in setbacks used for annuities and life insurance looks discriminatory and needs to be justified. *NAIC Brief* at 25.[67]

More fundamental problems with the accuracy of the setbacks employed by insurance companies to create mortality tables for women result because they are extrapolated from tables which do not present actual mortality data. For example, in preparing the life tables from the United States Census the collected data are adjusted to conform to certain expected trends. For example:

> For each pair of published life tables for males and females of a given color in a given State it was considered that the q_x[68] value for females at each age should be less than the corresponding value for males .... In every instance in which an adjustment was considered necessary, it was effected by redistributing by age the numbers of deaths into two or more adjacent groups, so the total number at all ages remained unchanged .... In many cases, the number of deaths in the age groups involved were redistributed by age in proportion to the corresponding numbers for the same sex and color for the United States. When this procedure failed to remove the observed anomalies, deaths were redistributed by age in a more arbitrary manner.

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[67]The fact that the use of sex-segregated mortality tables in pricing life insurance policies results in lower premiums for women than for men is sometimes used to suggest that the use of sex-segregated mortality tables by the insurance industry is not discriminatory. *See, e.g., ACLI Brief* at 11-12 n.3; *TIAA-CREF Brief* at 14. That argument is without merit. This Court forcefully pointed out in its opinion in *Manhart* that the focus of Title VII is fairness to the individual. 435 U.S. at 708. The use of sex-segregated mortality tables in setting life insurance premiums disadvantages men in the same manner it disadvantages women annuitants and is equally impermissible. As this Court emphasized in the context of a racially discriminatory practice which may operate against whites as well as blacks: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

[68]"q_x", the life table mortality rate, is the fraction or proportion of a group of persons at age x. who are expected to die before attaining age x + 1.

National Center for Health Statistics, *Methodology of the National and State Life Tables for the United States: 1969-71* (1975) at 3-17. Thus, a general statement that studies show lower mortality rates for women than for men at all ages conceals circular reasoning because mortality rate tables are adjusted to show that result.

III. BANNING DISCRIMINATORY TREATMENT OF FEMALE EMPLOYEES WILL NOT DESTABILIZE RETIREMENT PROGRAMS OR ENCOURAGE EMPLOYMENT DISCRIMINATION.

A number of *amici* assert that dire consequences will ensue should the Court affirm the illegality of the Arizona program. They claim that changes in the sexual composition of annuitant pools resulting from "adverse selection" will destabilize pension and annuity plans.[69] A related argument is that insurers will be unable to predict accurately the cost of annuity plans if they cannot use sex classifications, leading to an abandonment of plans with guaranteed benefits levels.[70] One *amicus* goes further, arguing that forcing the use of unisex plans will make women more expensive to employ, thereby creating an economic incentive encouraging discrimination by employers.[71] All of these fears are demonstrably unfounded.

Every ill consequence which *amici* argue would stem from the use of annuities that do not classify by gender must logically stem as well from the use of annuities that do not classify on the basis of smoking, obesity, alcohol consumption, or amount of exercise. Consider smoking. Adverse selection will take place as non-smokers (like women) flock to annuities while smokers (like men) steer away from them (and towards life insurance). Fluctuations in the number of smokers in the work force will affect the soundness of the plans. Yet no annuity plan offered through the Arizona program uses a setback for non-smokers. Evidently, the insurance industry considers the problems resulting from adverse selection by smokers to be sufficiently

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[69] *See ACLI Brief* at 19-22; *NAIC Brief* at 7-9; *TIAA-CREF Brief* at 5; *New York Brief* at 5, 14; *AAA Brief* at 10-11, 18; *Florida Brief* at 21-24.

[70] *AAA Brief* at 17.

[71] *ACLI Brief* at 9, 20, 21 n.12.

minor that eliminating them by introducing a smoking classification is not believed to be worthwhile.[72]

It may be natural for an insurer to overlook or downplay adverse selection relating to classifications not made by the insurer (smoking, obesity, level of physical activity, drinking habits, etc.) while dreading adverse selection resulting from abandonment of a classification presently used (sex), but there is no real difference. Failure to use a smoking classification has not destroyed pension and annuity plans, although smoking appears to have a greater impact on mortality than does gender.[73] Neither has failure to consider obesity, drinking habits, or medical history. Hence, there is no reason to believe that unmanageable difficulties will appear if gender classifications are eliminated.[74]

No reason exists to believe that the simultaneous availability to prospective annuity purchasers of sex-segregated annuities (in the open market) and unisex annuities (through employers) would disrupt insurance markets, because a similar situation now exists with respect to smoker classifications in life insurance policies: some life insurers treat smokers and non-smokers differently, and some do not.[75] Furthermore, because under the Arizona program employees must surrender the benefits of further tax deferral in order to take a lump sum distribution and purchase an annuity on the open market, the number of men electing to receive life annuities probably would not fall off

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[72]One *amicus* repeats an argument attributed to B.J. Lautzenheiser to the effect that more classifications (such as smoking and obesity) are not used in life annuity plans because people with these life-shortening traits are more likely to be interested in fixed-term annuities or in life insurance than in life annuities. *EEAC Brief* at 21-22 n.12; *see also ACLI Brief* at 11-12 n.2. The indifference with which the prospect of adverse selection by obese people or smokers is viewed contrasts sharply with the fear expressed at the prospect of adverse selection by men. *See, e.g., NAIC Brief* at 7-8. The situation is the same, yet favorable rates are offered to men to induce them to buy annuities, but not to smokers or the obese.

[73]*See supra* note 25, at 12.

[74]It has been noted that the insurance industry's arguments opposing the banning of gender classifications parallel the industry's arguments of a century ago defending the use of race classifications. *See, e.g.*, S. Rep. No. 671, 97th Cong., 2d Sess. 5-7 (1982). Obviously, the industry survived the outlawing of racially discriminatory practices.

[75]As of May 20, 1981, between 30 and 100 of the 1800 companies offering life insurance in the United States gave discounts to non-smokers. *1981 Hearings* at 148.

significantly. For this reason, the elimination of sex-segregated employee pension and annuity plans is highly unlikely to trigger adverse selection of a magnitude sufficient to jeopardize retirement programs.

Arguments of *amici* stressing the seriousness of the "accurate prediction" problem are no more credible than the "adverse selection" claims. Because of the statistical correlation between gender and longevity, a change in the sexual composition of an insured pool may affect the cost of annuity coverage to some extent. It is argued that a prohibition from charging different rates to men and women would impair an insurer's ability to handle this "risk." However, a change in the percentage of smokers in the insured pool, or the percentage of heavy drinkers, or of diabetics, would pose the same problem, yet insurers operate successfully in the face of these risks. No explanation has been put forward to show that gender classification is *uniquely* necessary. Furthermore, most defined benefit pension plans, such as the one offered by the State of Arizona, now provide equal monthly benefits for similarly situated male and female retirees. *See AAA Brief* at 5. If pension plans can be operated in a unisex fashion, it stands to reason that annuity plan can be as well.

Widespread employment discrimination against women as a result of the use of unisex annuity plans is unlikely because it would contradict much that we know about job markets. If businesses sought out employees on the basis of projected pension costs, then the smart job hunter would know the value of including in his or her resume that he or she smokes, is a "junk food junkie," doesn't exercise, and had no grandparents who lived to 70. Clearly, this is not the way the world works. If businesses do not discriminate against non-smokers or exercise buffs to save on pension costs today, there is no reason to believe that they will begin to discriminate against women to save on pension costs if sex-segregated pension plans are outlawed. Indeed, it is less likely that a company would discriminate against women than against non-smokers, since the former practice would violate Title VII.

CONCLUSION

The Deferred Compensation Program of the State of Arizona is facially discriminatory on the basis of sex, offering to men life annuity options with higher monthly benefit levels than the life annuity options available to women retiring at the same age. Similarly situated men and women are not treated equally by these annuity plans, and the actuarial arguments offered in support of the legality of the plans do not prove otherwise, for those arguments go to class impact rather than individual impact. Banning such discriminatory retirement plans will not revolutionize or threaten the stability of the insurance industry. For all these reasons, and for those advanced in the Brief for the Respondents, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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No. 82-52

In The

Supreme Court of the United States

October Term, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, et al.,

Petitioners,

v.

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE

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QUESTIONS PRESENTED

I. Is the use of sex-differentiated actuarial tables in the computation of retirement benefits, as distinguished from the computation of contributions, prohibited by Title VII (42 U.S.C. §2000e *et seq.*)?

II. Does the Tenth Amendment preclude Title VII from being invoked as a basis to prevent a state governmental employer from participating with a third-party insurer to provide annuity benefits based upon sex-differentiated actuarial tables?

III. Do the elements of a cause of action for discrimination under Title VII require that a defendant be the "employer" of the person claiming discrimination and be guilty of conduct constituting discrimination against such claimant?

IV. Assuming arguendo Arizona's annuity option violated Title VII, did the relief granted by the District Court, as affirmed by the Circuit Court of Appeals, contravene the holding of this Court in *Manhart*?

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE NEW YORK STATE TEACHERS' RETIREMENT SYSTEM AS AMICUS CURIAE*

---

*This brief is filed with the consent of all parties pursuant to Rule 36 of the Supreme Court.

INTEREST OF AMICUS CURIAE

The New York State Teachers' Retirement System is a public retirement system organized under Article 11 of the Education Law. It has the statutory responsibility to provide retirement benefits for professional employees of more than 800 participating public employers. Its membership consists of school teachers employed by each of the public school districts of the State, certain members of the universities and community colleges which are under the State University of New York and the New York State Education Department. It is one of the largest retirement systems in the country, including both public and private systems, with an active membership of over 190,000 and a retired population in excess of 50,000.

The benefits provided by the New York State Teachers' Retirement System to its retirees include pensions and annuities, both of which are subject to optional modification at the choice of the member. In computing these benefits, the New York State Teachers' Retirement System (hereinafter sometimes referred to as the "System"), for purposes of annuities and any optional modification, employs actuarial tables which are predicated upon the experience amassed by the System during its more than sixty years of operation. These actuarial tables are sex-differentiated, taking into account the sex of the retiree, and in cases of optional modification involving a joint life option, the sex of the retiree's beneficiary. The System's use of sex-differentiated actuarial tables is limited exclusively to the computation of benefits. Contributions made by both employers and employees are unaffected by the sex of any individual member; and, accordingly, are independent of sex.

The New York State Teachers' Retirement System is presently involved in litigation in the United States District Court for the Southern District of New York in cases brought by certain of its retirees and members which challenge the System's use of sex-differentiated actuarial tables. Since the litigation in which the System is engaged, does involve some of the same issues which have been raised in the *Norris* case, the

System is acutely interested in and will be materially affected by the outcome of the *Norris* case.

The System's actuary in an affidavit submitted to the United States District Court for the Southern District of New York in pending litigation has estimated a cost to the System of either $621 million or $689 million, depending on certain assumptions, in the event sex-differentiated actuarial tables are proscribed with full retroactivity and if females are required to have their benefits raised to male levels for purposes of annuities and males are required to have their benefits raised to female levels for purposes of optional modification. Accordingly, the outcome of the issues presented by the *Norris* case will have a very substantial cost, as well as operational impact, upon the System.

SUMMARY OF ARGUMENT

I. The use of sex-differentiated actuarial tables in the computation of annuity benefits, as distinguished from contributions to fund such benefits, is in no way prohibited by the holding of this Court in the case of *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978). Furthermore, the use of sex-differentiated actuarial tables in the computation of annuity benefits is not facially discriminatory and does not result in either "disparate treatment" under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) or a "disparate impact" under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); and, accordingly, the use of sex-differentiated actuarial tables in the computation of annuity benefits is legal and proper under Title VII.

II. A construction of Title VII which purports to extend the holding of *Los Angeles Dept. of Water and Power v. Manhart, supra*, so as to preclude the use of sex-differentiated actuarial tables in the computation of annuity benefits would constitute an unconstitutional invasion of the powers of the states in violation of U.S. Const., Tenth Amendment, as interpreted in the case of *National League of Cities v. Usery*, 426 U.S. 833 (1976).

III. Title VII (42 U.S.C. §2000e *et seq.*) governs relations between employers and their employees, not between employees and third parties. Title VII does not prohibit an employer from providing its employees with the opportunity of availing themselves access to sex-differentiated actuarial tables through an independent third-party insurance company, particularly where such tables are the standard of the industry.

IV. Even assuming arguendo Arizona's annuity option did violate Title VII, although indeed it did not, in any event, the relief granted by the District Court and affirmed by the Circuit Court of Appeals was in direct contravention of the decision of this Court in *Los Angeles Dept. of Water and Power v. Manhart, op. cit.* More specifically, the relief granted to plaintiff Norris by the courts below violated the *Manhart*

decision in that it was retroactively applied to contributions made since the inception of the plan; and, in addition, such relief was granted on a "best table" basis; i.e., plaintiff Norris' annuity was directed to be computed not merely from unisex actuarial tables but rather from male actuarial tables.

V. Although not an issue raised by the parties to this appeal and, therefore, not a matter hereinafter briefed by this Amicus, it is respectfully submitted to this Court for consideration at an appropriate juncture that the application of Title VII so as to preclude a public employer from providing retirement benefits based upon sex-differentiated actuarial tables as part of a state enacted statutory scheme is barred by the McCarren-Ferguson Act (15. U.S.C. §1011, *et seq.*). Amicus notes further that the McCarren-Ferguson issue was not raised in the *Manhart* case.

ARGUMENT

POINT I

THE USE OF SEX-DIFFERENTIATED ACTUARIAL TABLES IN THE COMPUTATION OF RETIREMENT BENEFITS, AS DISTINGUISHED FROM THE COMPUTATION OF CONTRIBUTIONS, IS NOT PROHIBITED BY TITLE VII.

In the case of *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), this Court specifically held:

> "Although we conclude that the Department's practice violated Title VII, we do not suggest the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund."

435 U.S. at 717.

If this Court were to extend the *Manhart* doctrine to proscribe the type of sex-differentiated annuity benefit which is provided by the Arizona Governing Committee ("Arizona") in the case at bar, then, indeed, the insurance and pension industry would be revolutionized. A fundamental actuarial cornerstone relied upon by pension funds for computing not only primary benefits, but also joint life optional benefits, would be destroyed.

The use of sex-differentiated actuarial tables in computing retirement benefits is a prerequisite to the actuarial soundness of pension plans. The mandating of unisex tables would result in widespread proliferation of the practice of adverse selection, which would undermine the fiscal stability of pension plans. For purposes of annuities females would take advantage of their artificially reduced life expectancy, as reflected in unisex tables, while men would opt for a lump sum or fixed term payout of benefits and purchase annuities in the open market where actuarial tables would provide them with a greater payout. As a consequence, unisex tables, reflecting the population mix of the

employer would not realistically reflect the life expectancies of the persons electing benefits pursuant to the tables and, accordingly, would result in an underfunding of the pension fund. On a cumulative basis this would undermine the financial integrity of the pension fund, with the resulting harm falling on innocent third parties.

The *Manhart* decision specifically recognized the need to protect innocent third parties from such harm. Although *Manhart* expressed this concern in the context of retroactivity, the harm would be no less devastating for those individuals who have to bear the consequences of underfunding, regardless of the cause.

In the *Manhart* decision, this Court held that the Los Angeles Dept. of Water and Power plan "on its face, discriminated against every individual woman employed by the Department." 435 U.S. at 716. The Circuit Court of Appeals in the instant case construed *Manhart* as imposing no affirmative burden on a plaintiff in a Title VII action to establish that the defendant acted with discriminatory intent. *Norris*, 671 F.2d 330 at 333. In effect, the Circuit Court in *Norris* held that there were three ways to prove a cause of action for discrimination under Title VII: (a) facial discrimination; (b) "disparate impact" under the theory of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); or (c) "disparate treatment" under the theory of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)

In contrast, the 6th Circuit in the recent decision of *Peters v. Wayne State University*, Nos. 79-165B, 79-1670, 79-1671 (decided October 14, 1982), interpreted Title VII, as construed by this Court, as providing only two theories of liability—one

based upon "disparate impact" in cases of a facially neutral plan and the other based upon "disparate treatment" in cases of a facially discriminatory plan. The Court in *Peters v. Wayne State University* stated as follows:

> " 'It is well established under Title VII that claims of employment discrimination...may arise in two different ways.' *Furnco Construction Co. v. Waters*, 438 U.S. 567, 581-588 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either 'disparate treatment' or disparate impact. 'The central focus of the inquiry...is always whether the employer is treating 'some people less favorably than others *because of* their...sex.'" *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters v. United States*, 413 U.S. 324, 335 n. 15 (1977)."

___ F. 2d at ___.

Amicus respectfully submits that the view expressed in *Peters v. Wayne State University*, rather than *Norris*, constitutes the correct construction of Title VII. However, even assuming arguendo the *Norris* view were to be approved by this Court, in any event, Amicus further submits for the reasons hereinafter set forth that the use of sex-differentiated actuarial tables in the calculation of retirement benefits is not facially discriminatory and does not result in either "disparate impact" or "disparate treatment"; and, accordingly, the use of sex-differentiated actuarial tables in the computation of retirement benefits in no way violates Title VII.

A. FACIALLY NON-DISCRIMINATORY

In the first place, sex-differentiated actuarial tables, when employed in the context of benefit computations, are not discriminatory on their face. Unlike the situation where sex-differentiated actuarial tables are used to compute contributions to a retirement plan, no distinction whatsoever results in the take-home pay of similarly situated males and females. In

the case of *Peters v. Wayne State University et al., supra*, the Court stated:

> "In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. *Consequently, they receive equal compensation.*"

___ F. 2d ___ (emphasis added).

Because no differential existed between the contributions and the resulting take-home pay of males and females, the Court in *Peters* concluded the issue of discrimination must be examined in the context of an *employee benefit plan, not employee wages*. The Court in *Peters* predicated its analysis in this regard upon the two landmark benefit cases, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), reh. den. 429 U.S. 1079 (1977), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), quoting Justice Renquist's analysis in *Gilbert* as follows:

> "As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program... accrue to members of both sexes." 417 U.S., at 497 n 20.
>
> • • •
>
> "The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' Id., at 496-497....
>
> "As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*"

Peters quoting *Gilbert* at 429 U.S. at 138-139 (citations and footnotes omitted) (emphasis as added in *Peters*).

In contrast to *Manhart* where each woman received a lesser take-home pay than her similarly situated male counterpart as a consequence of sex-differentiated actuarial tables, when sex-differentiated actuarial tables are applied to benefits, a woman may receive either a lesser or a greater periodic retirement benefit than her male counterpart depending upon the form in which she elects her retirement benefit. Although women receive a lesser basic annuity as a consequence of their greater life expectancy, the reduction of that annuity benefit is less than the reduction applicable to a similarly situated male when optional modification in the form of a survivor option is elected. This occurs because the election of a survivor option is in the nature of the purchase of insurance and the cost of such insurance is less for females than males due to their greater longevity; i.e., both the probability that the survivor option will have to be paid out and the period of payment, if any, are reduced by the fact that the female has a greater expected longevity than her male counterpart.[1]

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[1]The fact that sex-differentiated actuarial tables are a double-edged sword which, in the context of options, can either serve to increase or decrease the retirement allowance is exemplified by the circumstances of a woman named "Bessie Hannahs" who has sued the New York State Teachers' Retirement System challenging its usage of sex-differentiated actuarial tables in the computation of benefits. In an affidavit furnished upon the direction of the Hon. Charles S. Haight, Jr., District Court Judge in an interlocutory decision in *Hannahs v. New York State Teachers' Retirement System, et al.*, 26 F.E.P. *Cases 527* (1981), which is pending in the United States District Court for the Southern District of New York, the Actuary for the System stated that Ms. Hannahs' retirement allowance, based upon her election of a 100% joint and survivor option, "would be reduced by $289.80 from $7,334.76 to $7,044.96, if it were recomputed under the unisex tables."

The Actuary further indicated: "If a retroactive revision of benefits is required, then more substantial reductions than those indicated above will be necessary in order to gradually recover the overpayments made in prior years. In Bessie Hannah's case, if NYSTRS had to recoup the overpayments which she has received under sex distinct tables, her annual retirement allowance

When optional modification is taken into account, some female employees enjoy a net gain in benefits when compared to benefits under unisex tables, while some female employees suffer a net loss. Likewise, some male employees enjoy a net gain while others incur a net loss. The resulting gain or loss is a function of the nature of the option, the respective sex of the employee and the beneficiary, and the respective ages of the employee and the beneficiary.[2] In any event, it is clear that sex-differentiated actuarial tables when used for computing retirement benefits are not discriminatory on their face. Unlike *Manhart* every individual woman does not receive a lesser benefit than a similarly situated male when sex-differentiated actuarial tables are applied to the computation of benefits. See *Manhart*, 435 U.S. at 716.

(continued from preceding page)

would be reduced by an additional $136.32, as computed over the balance of her life expectancy under the unisex tables. Her new allowance would be $6,908.64 under the unisex tables, which is $426.12 less than she is currently receiving under NYSTRS' sex distinct tables."

[2] Pursuant to the statutory benefits provided by the New York State Teachers' Retirement System, as mandated by New York State Education Law, Article 11, other factors such as years of service, final average salary, etc. also serve to affect not only the magnitude of a retiree's allowance, but also the magnitude of any increase or decrease occasioned by the election of an option.

B. NO "DISPARATE TREATMENT"

With regard to a Title VII claim founded upon alleged "disparate treatment" this Court has held that the plaintiff must establish that the defendant acted with a discriminatory motive. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 336, n. 15 (1977). In the case of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court further held in regard to a claim based upon alleged "disparate treatment":

> "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

450 U.S. at 253.

The *Manhart* decision makes it clear that the tests to be applied in determining liability for discrimination under Title VII in the context of insurance related practices are no different than in other cases. This Court stated in *Manhart:*

> "Finally, there is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage."

435 U.S. 702 at 710.

Based upon the language just quoted from *Manhart*, it is apparent that the requirement of *Burdine* that a plaintiff establish discriminatory intent in order to sustain a claim founded upon "disparate treatment" is applicable to plaintiff Norris. It is equally clear from the record that plaintiff Norris failed to sustain this burden.

The stipulated facts show that the plan is "offered to all state employees on a voluntary basis. There is no employer contribution to the plan." 486 F. Supp. 645, 648. The life annuity option was provided to members along with the choice of a lump-sum option or a fixed monthly payout over a specified period of time. The annuity was provided through separate companies as funding media which included insurance companies. Calculation of the annuity payout was determined

pursuant to mortality tables published in the contract with the particular insurance company. "All of the companies participating in the State Deferred Compensation Plan use sex segregated actuarial tables." *Id.*, at 648. Plaintiff Norris "requested that her monies be invested in Lincoln National Life Insurance Company's fixed annuity contract." *Id.*

If the life annuity had not been provided as part of the Plan, the participants, in order to receive their benefit in the form of a life annuity, would have been required to first bear the tax consequences of receiving their contributions in the form of a lump sum and then purchasing an annuity in the open market. In the open market, not only would participants have been subject to sex-differentiated actuarial tables, but also they would have had fewer dollars with which to buy their annuity due to the intervening tax consequences. Thus, every man and every woman buying an annuity in the open market would receive a lesser monthly annuity than that provided under the Plan.

In view of the foregoing , and particularly the fact that Arizona did not itself use sex-differentiated actuarial tables, it is obvious that Arizona did not have the discriminatory intent which is required to sustain a cause of action for "disparate treatment." In addition, the District Court found that Arizona did not act out of purposeful discrimination. 486 F. Supp. 645 at 651. Based upon plaintiff Norris' failure to prove discriminatory intent, any claim by her grounded upon alleged "disparate treatment" must fail.

Even assuming arguendo that Arizona itself used sex-differentiated actuarial tables, it is obvious that reliance on such tables was not a pretext to mask an intention to disadvantage and harm females. The use of sex-differentiated tables to calculate benefits is merely an accepted actuarial practice. *Peters v. Wayne State University, supra.*

C. NO "DISPARATE IMPACT"

Finally, scrutiny under a "disparate impact" theory of plaintiff Norris' challenge to the use of sex-differentiated actuarial tables in the computation of her retirement benefits demonstrates her claim must fail.

"Disparate impact" occurs when an employer's facially neutral policy burdens one class more than another. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In the instant case, the use of sex-differentiated actuarial tables does not burden one class more than another. As indicated above, no differentiation exists in regard to take-home pay as between males and females such as existed in *Manhart*.

Since this case involves an employee benefit plan, rather than employee wages, the analysis set forth earlier, based upon *General Electric v. Gilbert, supra,* and *Geduldig v. Aiello, supra,* is controlling. The value of the package to each of the sexes must be examined to determine the existence of a discriminatory impact or effect. The principle underlying this determination was enunciated in *Gilbert* where this Court held:

> "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme."

429 U.S. at 138.

It was on this basis the Circuit Court of Appeals for the 6th Circuit in *Peters v. Wayne State University, supra,* held that the retirement benefits package offered by Wayne State University, although based on sex-differentiated actuarial tables, was not worth more to men than to women and, therefore, did not violate Title VII. On this same basis the retirement benefits package offered here by Arizona has no discriminatory impact or effect and, thus, satisfies Title VII.

Even assuming arguendo, the use of sex-differentiated actuarial tables in the computation of retirement benefits resulted in a discriminatory impact upon females (which it

clearly does not for the reasons set forth above), the claim of plaintiff Norris nevertheless could not be sustained. A showing of discriminatory impact merely serves to establish a *prima facie* case. *Griggs v. Duke Power Co., supra,* at 430-432. The burden then shifts to the employer to demonstrate that the practice has a "manifest relationship to the employment in question." *Id.*, at 432.

In the case of *Peters v. Wayne State University, supra,* the Circuit Court of Appeals for the 6th Circuit, in holding that no violation of Title VII occurred as a result of Wayne State's use of sex-differentiated actuarial tables, demonstrated that the use of such tables constitutes a legitimate business practice.

> "Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not life to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age."

___ F. 2d at ___

The legitimacy of using sex-differentiated actuarial tables in the computation of benefits is also substantiated by the employer's need to avoid the inevitably insidious fiscal consequences of *adverse selection* which would flow from a mandated implementation of unisex tables. Finally, the very fact that Arizona, if it is to provide the annuity option to its plan participants, can only do so by using the actuarial tables available to it in the insurance industry, all of which are sex-differentiated, demonstrates that the use of sex-differentiated actuarial tables is based upon a necessary business practice.

In summary, it is respectfully submitted that the use of sex-differentiated actuarial tables in the computation of retirement benefits is not discriminatory on its face and does not result in either "disparate treatment" or a "disparate impact" in violation of Title VII.

POINT II

TO THE EXTENT TITLE VII PURPORTS TO PRECLUDE A STATE GOVERNMENTAL EMPLOYER FROM PARTICIPATING WITH A THIRD-PARTY INSURER SO AS TO PROVIDE ANNUITY BENEFITS BASED UPON SEX-DIFFERENTIATED ACTUARIAL TABLES, TITLE VII VIOLATES THE TENTH AMENDMENT.

In the case of *National League of Cities v. Usery*, 426 U.S. 833 (1976), this Court held that the extension of the minimum wage and maximum hour provisions of the Fair Labor Standards Act to cover employees of States and their political subdivisions violated the Tenth Amendment. In the *National League of Cities* case this Court stated:

> "...the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' 'ability to function effectively in a federal system,' *Fry*, 421 U.S., at 547 n. 7. This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."

426 U.S. at 852.

The *National League of Cities* case was predicated upon a challenge to the limits of Congress' authority under the Commerce Clause. The decision noted that it expressed "no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the speinding power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.*, at 852, n. 17.

In the instant case, the Circuit Court of Appeals, relying upon the case of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), held that Arizona's Tenth Amendment argument lacked merit. However, the *Fitzpatrick* case is inapposite since it merely held that the imposition of an award of damages under Title VII against a state government is not violative of the Eleventh Amendment. *Fitzpatrick* did not hold that § 5 of the Fourteenth Amendment authorized Congress to enact legislation superseding the integral operations of state governments, notwithstanding the Tenth Amendment.

Likewise, the *Manhart* decision did not address the issue of whether integral operations of state governments were protected by the Tenth Amendment from purported interference under Title VII. In any event *Manhart* is distinguishable from the instant case in that in *Manhart* the take-home pay of every female was mandated by the plan to be less than that of a similarly situated male. In the instant case Arizona has merely made available an additional voluntary option pursuant to which an employee may receive his contributions and accruals thereon in the form of an annuity. Even assuming Title VII, despite the holding of *National League of Cities*, does preclude the application of sex-differentiated actuarial tables in the context of mandatory contributions, it should not be extended beyond the holding in *Manhart* to preclude a public employer from making available an additional optional form of retirement benefit, particularly where that benefit is provided based upon actuarial tables used by an outside insurer which are standard to the industry. Such an extension of *Manhart* would

unreasonably invade the rights of the states to determine the manner of operation of their integral functions.

In the *Manhart* case this Court emphasized Title VII was not intended "to revolutionize the insurance and pension industries." 435 U.S. at 717. This Court further stated:

> "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market."

Id., at 717-718.

Given that *Manhart* did not preclude an employer from setting aside equal retirement contributions for each employee to purchase the largest benefit available in the open market, it likewise follows that an employer should not be precluded from allowing each employee an additional option to use his or her own contributions to purchase an annuity from an independent insurance company in accordance with the actuarial tables used in the open market. The distinction between that which *Manhart* countenanced and the conduct of Arizona herein sought to be prohibited is without a meaningful distinction.

In summary, Amicus respectfully urges that the *Manhart* decision should not be unnecessarily extended in a fashion which will result not only in artificial distinctions but also will unreasonably erode the Tenth Amendment.

POINT III

THE MANHART DECISION WAS EXPRESSLY LIMITED TO DISCRIMINATORY CONDUCT BY AN "EMPLOYER," AND AS A MATTER OF LAW THERE WAS NO DISCRIMINATION BY AN "EMPLOYER."

The term "employer" for purposes of Title VII is defined in 42 U.S.C. §2000e(b), subject to certain exclusions not herein applicable, as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person ... except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972 [Mar. 24, 1972], persons having fewer than twenty-five employees (and their agents) shall not be considered employers." The term "employee," as defined in 42 U.S.C. §2000e(f), sheds no additional light on the manner in which the term "employer" is to be construed for purposes of Title VII.

Amicus respectfully submits that the absence of any special language in 42 U.S.C. §2000e in regard to the definition of the term "employer" requires a construction of that term in accordance with its traditional common law definition. The principle of statutory construction is well established that language and terms contained in statutes must be read in accordance with their ordinary meanings absent a showing that Congress used a special definition or otherwise indicated an intent that a special definition be invoked. *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975).

In the case of *Hishon v. King & Spaulding*, 678 F. 2d 1022 (11th Cir. 1982), the Court noted that the legislative history surrounding the term "employer" as used in Title VII reveals but a single remark. That one remark, as noted by the Court, was a statement by Senator Clark "that the term employer was 'intended to have a common dictionary meaning except as

expressly qualified by the Act.' 110 Cong. Rec. 7216 (April 8, 1964)." 678 F. 2d at 1027.

And in the case of *Smith v. Dutra Trucking Company*, 410 F. Supp. 513 (N.D. Cal. 1976) aff'd 580 F. 2d 1054 (9th Cir. 1978), the Court concluded:

> "[T]here is nothing in the legislative history of the Act to indicate a Congressional intent to construe the term 'employee' in any manner other than in accordance with common law agency principles. Those are the principles by which plaintiff's assertion that she is an employee must be evaluated."

410 F. Supp. at 516.

In the case of *Spirides v. Reinhardt*, 613 F. 2d 826 (Dist. of Col. Cir. 1979), the Court enunciated the test to be applied for purposes of Title VII:

> "This test calls for application of general principles of the law of agency to undisputed or established facts. Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor to review here, as it is at common law and in the context of several other federal statutes. If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."

613 F. 2d at 831-832 (footnotes omitted).

Based upon the ordinary and traditional meaning of the term "employer," the legislative history surrounding that term, and the judicial test set forth in *Spirides* for determining the existence of an employer-employee relationship for purposes of Title VII, it is apparent that the private insurance companies from whom the plaintiff Norris was able to purchase an annuity were not her employer for purposes of Title VII.

In *Manhart* this Court stated: "Title VII and the Equal Pay Act govern relations between employees and their employers, not between employees and third parties." 435 U.S. at 718, n.33. Pursuant to the foregoing analysis it is clear that the insurance companies involved in the instant case, all of which used sex-differentiated actuarial tables, were "third-parties" rather than plaintiff Norris' "employer."

Although this Court also noted in *Manhart* that an employer could not avoid its responsibilities under Title VII "by delegating discriminatory programs to corporate shells," *Id.*, it is beyond cavil that the said insurance companies were not corporate shells of Arizona.

Finally, this Court also pointed out in *Manhart:* "Title VII applies to 'any agent' of a covered employer, 42 U.S.C. §2000e(b) (1970 ed., Supp. V), and the Equal Pay Act applies to 'any person acting directly or indirectly in the interest of an employer in relation to an employee,' " *Id.*, at 718, n. 33. However, examination of the basis on which annuity benefits, where elected, were provided, demonstrates that the insurance companies providing such benefits were neither the agent of Arizona nor did they act directly or indirectly in the interest of Arizona.

The District Court noted, based upon the facts stipulated to by the parties, that amounts received by persons such as plaintiff Norris were "determined by the use of actuarial tables published by the particular company." 486 F. Supp. at 648. Specifically as to plaintiff Norris, the District Court indicated that on May 3, 1975, she "made application to the Governing Committee to participate under the Plan and requested that her monies be invested in Lincoln National Life Insurance Company's fixed annuity contract." *Id.* The benefit provided to plaintiff Norris, which she indeed selected herself, and, particularly, the computation of that benefit based upon sex-differentiated actuarial tables, was obviously not a consequence of any "control" exercised by Arizona over the Lincoln

National Life Insurance Company, nor was it a consequence of any action taken by the Lincoln National Life Insurance Company "in the interest" of Arizona. The Lincoln National Life Insurance Company, like all of the insurance companies available to Arizona, had long since used sex-differentiated actuarial tables in the computation of benefits. Their use of sex-differentiated actuarial tables was strictly a matter of self-interest, being in no way related to the interests of Arizona. Their use of sex-differentiated actuarial tables was their means of risk classification which would fund their obligations in an actuarially sound fashion which did not invite deficits resulting from large scale adverse selection. Most demonstrative of the fact that Lincoln's use of sex-differentiated actuarial tables was not an action in the interest of Arizona was that Arizona received no savings or other benefit from the use of such tables. Arizona provided the benefit merely to enable plan participants, all of whom were voluntary, to enjoy access to an open market annuity without having to bear the tax consequences of first withdrawing their monies from the plan before purchasing the same annuity in the open market.

In summary, Title VII, in accordance with 42 U.S.C. §2000e-2(a), prohibits discrimination by an employer. Arizona as an "employer" committed no act of discrimination, and, clearly, Lincoln National Life Insurance Company was not the "employer" of plaintiff Norris.

POINT IV

EVEN ASSUMING ARGUENDO ARIZONA'S ANNUITY OPTION DID VIOLATE TITLE VII, NEVERTHELESS THE RELIEF GRANTED BY THE COURTS BELOW WAS CONTRARY TO THE MANHART DECISION.

At the outset it must be emphasized for the reasons set forth by the petitioner in its petition for certiorari, as well as those set forth hereinabove, Arizona's annuity option, which was based upon sex-differentiated actuarial tables, did not violate Title VII. However, even assuming arguendo it did, in any event, it was error for the courts below to order that Arizona supplement the future life annuity payments paid by independent insurance companies to female employees in order to make them equal to those paid to similarly situated male employees. The granting of such relief was contrary to the holding of this Court in *Manhart*.

In denying retroactive relief in *Manhart* this Court indicated, "Retroactive liability could be devastating for a pension fund." 435 U.S. at 722. In addition, this Court stated:

> "These plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. *Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation.* The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result."

Id., at 721 (emphasis added).

In the instant case, plaintiff Norris enrolled in the deferred compensation plan in 1975. A requirement that Arizona

increase her future annuity payments with regard to contributions made prior to the 1978 decision in *Manhart* obviously would have a retroactive effect in contravention of *Manhart*. As this Court noted, "pension administrators could reasonably have thought it unfair — or even illegal — to make male employees shoulder more than their 'actuarial share' of the pension burden." *Id.*, at 720. And with regard to the issue of unequal benefits, as contradistinguished from unequal contributions, pension administrators, at the very least, certainly remain justified in relying upon sex-differentiated actuarial tables based upon the existing split of authority in the United States Circuit Court of Appeals. [See *Peters v. Wayne State University, supra;* cf. *EEOC v. Colby College*, 589 F. 2d 1139 (1st Cir. 1978)].

In *Manhart* this Court specifically denied a backpay award, 435 U.S. at 723, i.e., a refund of excess contributions made by women to the Los Angeles Department of Water and Power plan prior to the *Manhart* decision. Thus, this Court refused to apply unisex tables to contributions made prior to its decision. The granting of increased future annuity payments to plaintiff Norris, based upon her contributions back to 1975, had the effect of applying unisex tables to contributions made prior to *Manhart* and constitutes a backpay award in violation of the *Manhart* decision.

Not only have the Courts below improperly granted plaintiff Norris a backpay award, but, in addition, the award so granted exceeded that which would have been allowable were a backpay award even appropriate. Arizona was ordered to bring the future annuity payments of females up to the level of their male counterparts. Thus, the award gave females for purposes of annuity payments the benefit of "best tables" or the male tables, not merely unisex tables. This award was contrary to the language of this Court in *Manhart* as follows:

> "Further doubt about the District Court's equitable sensitivity to the impact of a refund order is raised by the

> court's decision to award the full difference between the contributions made by male employees and those made by female employees. This may give the victims of the discrimination more than their due. If an undifferentiated actuarial table had been employed in 1972, women employees would no doubt have been lower than they were, but they would not have been as low as the contributions actually made by men in that period. *The District Court should at least have considered ordering a refund of only the difference between contributions made by women and the contributions they would have made under an actuarially sound and nondiscriminatory plan.*"

435 U.S. at 720, n.36 (emphasis added).[3]

In summary, even assuming for purposes of argument Arizona's annuity option did violate Title VII, in any event, it was error not only for the courts below to grant retroactive relief, but, in addition, the error was compounded by basing such retroactive relief upon male actuarial tables.

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[3]Although the magnitude of the total costs of the relief granted in Arizona's case may be relatively small because the plan was only begun in 1975 and the number of participants was not large, the costs to other plans of retroactive liability for use of sex-differentiated actuarial tables in the computation of benefits would be far greater. E.g., in the case of the New York State Teachers' Retirement System the costs on a "best tables" basis has been indicated by the System's actuary to be either $621 million or $689 million depending upon certain other actuarial assumptions. Estimates by the actuaries of the New York State Employees Retirement System, the New York State Policemen's and Firemen's Retirement System, and the New York City public retirement systems indicate combined costs of retroactive liability on a "best tables" basis in excess of $1.6 billion. This Court noted in *Manhart* that retroactive relief should not be granted regardless of the fact that the cost to a particular plan might be small, but rather remedies must be founded on principle. *Manhart* at 722, n. 42.

CONCLUSION

The New York State Teachers' Retirement System, as Amicus Curiae, respectfully submits that the judgment of the United States District Court, District of Arizona, as affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, should be reversed as a matter of law for the reasons hereinabove set forth.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

—v.—

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-52

ARIZONA GOVERNING COMMITTEE FOR TAX DEFERRED ANNUITY AND DEFERRED COMPENSATION PLANS, STATE OF ARIZONA, *et al.*,

Petitioners,

—v.—

NATHALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TEACHERS INSURANCE AND ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND AS AMICI CURIAE IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

By consent of all parties, Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF") submit this brief as *amici curiae* in support of petitioners. This brief addresses the absence of any proof of discriminatory intent in this Title VII dis-

parate treatment case and the legitimate, non-discriminatory justification for the challenged use of sex-distinct mortality tables. For the reasons stated herein, the decision of the Ninth Circuit finding that petitioners ("Arizona") had violated Title VII should be reversed.

INTEREST OF THE AMICI

TIAA and CREF are insurers providing annuities to persons employed in higher education. While our interest here in certain of the questions raised is substantial, we recognize that there are a number of other related issues not directly involved here. This is due, in large part, to the differences between Arizona's plan and the typical plan adopted by institutions in the TIAA-CREF system. Arizona's plan is a completely voluntary deferred compensation plan with a cash option. Those in the TIAA-CREF system are insured pension plans requiring, for the most part, mandatory participation and providing lifetime annuity income but no cash option. The primary concern of Arizona is the "open market" exception to the holding in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), while the scope of the issues raised in the litigation involving TIAA-CREF referred to below is much broader.

One dispositive issue raised here and also in the TIAA-CREF litigation, however, is the requirement that a plaintiff show discriminatory intent to prevail in a Title VII disparate treatment case. The bulk of this brief is devoted to the legal consequences of respondents' failure to make any such showing below. The following preliminary material is offered as background to a discussion of the use of sex-distinct mortality tables in general and in defined contribution pension plans in particular.

A. The TIAA-CREF System

TIAA is a non-profit legal reserve life insurance and annuity company organized under New York law in 1918. CREF is a not-for-profit corporation created in 1952 as a companion organization to TIAA. TIAA and CREF employer-sponsored pension plans provide annuity contracts to employees of non-profit educational and research institutions.

More than 700,000 persons presently have contracts with TIAA-CREF and more than 3,400 institutions have TIAA-CREF retirement plans. Over 85% of all private four-year colleges and universities and 40% of all public colleges and universities have retirement plans funded through TIAA and CREF contracts. The TIAA-CREF contracts are "portable"; that is, the benefits are fully vested and immediately funded under individual contracts that employees retain wherever they may transfer employment, even if they leave higher education. Contributions by and on behalf of similarly situated male and female employees are equal.

Under the terms of each participant's separate contract, as each contribution is made, it is immediately credited to an individual account established for each employee and purchases the right to lifetime annuity benefits or a death benefit prior to retirement. The TIAA-CREF annuity contracts under these pension plans do not permit the participant to obtain a lump sum payment of the contract's value (*i.e.*, a "cash option"). Rather, the contracts require that benefits be paid to the participants only in the form of lifetime annuity income.

Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law. Pursuant to the requirements

of the Insurance Law, TIAA and CREF contracts and other materials reflecting the use of sex-distinct mortality tables are submitted to and approved by the Insurance Department.

TIAA-CREF's use of sex-distinct mortality tables has been challenged under Title VII in ten separate actions in federal courts. Decisions in three of these actions[1] form much of the legal framework upon which other similar actions have been decided. The lower court opinions in this action are based upon many of the holdings announced in those decisions.

B. Annuity and Insurance Principles

Even though an insurer is not here a party, the present issue of Title VII discrimination nonetheless should be understood in the context of certain actuarial principles fundamental to annuities and life insurance which were not addressed in the lower court opinions. The following brief summary of those principles is offered, therefore, as a basis for the discussion which follows.

The purpose of an annuity is to insure individuals against the financial risk of "living too long" by guaran-

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1 *Spirt* v. *Teachers Insurance and Annuity Association*, 29 Fair Empl. Prac. Cas. (BNA) 1599 (2d Cir.), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. November 9, 1982) (No. 82-791); *Peters* v. *Wayne State University*, Nos. 79-1658, -1670, -1671 (6th Cir. October 14, 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. November 10, 1982) (No. 82-794); and *Equal Employment Opportunity Commission* v. *Colby College*, 589 F.2d 1139 (1st Cir. 1978).

The Court of Appeals decision in *Peters* is as yet unreported and is set forth in the Appendix hereto. Citations to material in the Appendix appear as "____ a."

teeing that they will receive a stated level of retirement income, regardless of how long they may live. An insurer can commit to a rate of payment only by application of what is called the statistical law of large numbers, which essentially provides that, given a large enough body of data respecting similar risks, the accuracy of predictions made based upon that data approaches certainty. By applying this principle, an insurer, although it cannot identify in advance *which* incidents of risk will occur, can predict *how many* will occur within a large group of persons presenting similar risk characteristics and thus obligate itself to provide benefits accordingly.

At the same time, insurers such as TIAA-CREF face the conflicting requirement of recognizing the equities of each of the participants in his or her individual accounts. "Equity" in insurance means that the insureds are entitled to receive in benefits the full, or equitable, value of the premiums they have paid and the earnings thereon, in light of the risk they present. If individuals perceive that they are being treated inequitably by an insurer (*e.g.*, by paying too high a premium for the value of the coverage they receive), they will eventually withdraw from the pool.

Equity in insurance is achieved through a process called risk classification. The insurer attempts to group or classify persons according to the degree of risk (here, anticipated longevity) presented. Each of the persons within each of those groups then pays the same premiums and receives the same benefits. Individuals are thereby protected from being overcharged, and the insurer is protected from the results of undercharging, as would occur if separate groups were not established.

The factors taken into account in classifying risks for annuities are those that are stable, significant and objectively measurable.[2] Age and sex are the only such risk classification factors that meet this test, and they are universally used by insurers in issuing annuities.

The significance of gender to mortality risk appears clearly from TIAA-CREF's own mortality data, which are reviewed annually and are particularly credible in light of the large number of annuitants involved. Studies of TIAA-CREF annuitants during 1965-70 show, for example, that at ages 66-70 men's rate of death was two-and-one-half times that of women. The data also show that the male mortality rate is greater, at every age, than the female mortality rate. At age 65, a typical retirement age, the female annuitants in the TIAA-CREF system have a life expectancy of approximately 22 years, while the males' life expectancy is then approximately 18 years.

Because women on average live more years than similarly situated men and accordingly require a greater number of annuity payments, more money is required to pay annuity benefits to women at the same periodic rate as paid to a like group of men. Conversely, given equal accumulations at retirement for men and women, benefits must be paid at a lower periodic rate to the women in order to avoid exhausting the funds accumulated by and for the women while many of them are still living.

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2 *See* Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits*: Manhart *Revisited*, 49 U. Chi. L. Rev. 489, 499-501 (1982) [hereinafter cited as "Benston"].

C. The Significance of Questions Not Raised in *Norris*

While a common theme of *Norris*, and the TIAA-CREF cases, *Spirt* and *Peters*, is the question of *Manhart's* proper scope and application, the holding in *Manhart* poses widely divergent, but very important, questions for various segments of the insurance and pension industry and those who transact business with them. Further, no single case in which the use of sex-distinct mortality tables has been challenged, including *Norris*, raises all of the significant questions. Because the issues *not* raised in *Norris* are, nonetheless, related to or interdependent with some of those that are, a brief discussion of certain of them is appropriate.

i. Insurer's justification for the use of sex-distinct tables

A number of significant issues left unanswered by *Manhart* are not directly raised by *Norris* because there is no insurer involved here as a party. An insurer's justification for the use of sex-distinct mortality tables, for example, and a trial court record supporting that justification, are absent. Every insurer establishing individual accounts for its participants faces the requirement of "equity" while at the same time being able to guarantee each annuitant an income for an indeterminant "lifetime." The use of a sex-distinct mortality table achieves this goal.

Manhart, in which an employer-operated plan with no individual accounts was at issue, does not require insurers to disregard equity, nor in insured pension plans, does it require the men or the employers to subsidize the women. *See* pp. 24-25, *infra*. In *Peters*, where individual accounts established by insurers for each participant were involved,

the court held that *Manhart* did not compel any finding there of Title VII discrimination. 7-8a.

To decide, as the Ninth Circuit did, that Arizona discriminates merely because it deals with insurers which engage in the challenged use of sex-distinct mortality tables is tantamount to deciding that the insurer's actions may not be justified and that such justification would be immaterial. Any such decision should, rather, be based upon an insurer's articulated reasons for the use of those tables and a substantiating trial court record, as it was for example in *Peters*.

ii. The McCarran-Ferguson Act

The absence of an insurer as a party here also means that the exemption from unintended federal intervention into the "business of insurance" provided by the McCarran-Ferguson Act ("the Act") is also not *directly* involved. The Act (15 U.S.C. §§ 1011 *et seq.* (1976)) is designed to foster continued state regulation of the business of insurance without the conflicting application of federal legislation, such as Title VII, where there is no specific reference to that "business" as required by the Act. There is here no direct federal-state struggle over the regulation of insurers as in *Spirt*, pitting the EEOC against state insurance commissioners. To decide, however, that petitioners' actions may be enjoined as violative of Title VII would be to permit an effective, though indirect, regulation of insurers where the Act would otherwise forbid it. The purposes of the Act would be nullified if a state's determination that the use of sex-distinct tables was not discriminatory could be relied on by an insurer only at the sacrifice of its clients.

iii. Retroactivity

Finally, no question of any claimed retroactive effect of the relief granted is here under scrutiny. Assuming, *arguendo*, that some form of relief is appropriate in this case, any required "equalization" of benefits presents very serious problems for employers and insurers. To pay females greater periodic annuity benefits in the TIAA-CREF system, for example, would obviously require an infusion of money from one of two sources: employers or males. If the equalization is to be achieved at the males' present level (*i.e.*, "topping up"), the employer is the only source of the money which would be needed to accomplish such a result. If a level of equalization between the present male and female levels is desired (*i.e.*, "unisex"), the cost of higher benefits to the women would be borne by the males because the value of premiums paid by them in the past would be reduced.

An award applicable to any past contributions, whether for persons now retired or not yet retired, would grant retroactive relief forbidden by *Manhart*. To rule that employers must add additional moneys now to supplement past contributions would simply be another way of declaring—for the first time—that their original pension obligations were not fulfilled. Any forced subsidization of women by a reduction of men's annuities would also frustrate the latter's expectations that their annuity benefits would be calculated on the basis of the risk they present.

The enormity of an award requiring equalization of periodic benefits would either place extreme financial strain on employers (in the TIAA-CREF system on the already overburdened resources of higher education) or require the weight of increased pension costs to fall upon

innocent third parties—the males—both results contrary to the clear warnings this Court issued in *Manhart*. 435 U.S. at 720-23.

D. Analysis of This Disparate Treatment Claim Under Title VII

An issue raised below, but largely ignored by the Ninth Circuit, is the requirement that discriminatory intent be demonstrated for a plaintiff to prevail in a Title VII disparate treatment case such as that here. No such intent to discriminate appears here. Moreover, it would seem, Arizona has articulated a legitimate non-discriminatory reason for its challenged actions, and plaintiffs have made no showing whatever that the articulated justification was a pretext covering a desire to harm women. Under the rationale of cases such as *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and *Peters*, respondents here have thus not made a sufficient showing to prevail under Title VII. It is to this issue that we now turn.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit is at odds with the rule requiring a plaintiff to show discriminatory intent or animus to prevail in a Title VII disparate treatment case. This rule, recently reiterated in *Burdine*, would require plaintiffs to demonstrate that annuities using sex-distinct mortality tables in the calculation of benefit rates were offered as an option for the specific purpose of disadvantaging women. In rejecting plaintiffs' constitutional claim, the district court found no such intent.

Even assuming that plaintiffs have proven a *prima facie* case of Title VII discrimination, Arizona would

appear to have articulated a legitimate, non-discriminatory reason justifying its actions: no other option was available to it. Insurers universally use sex-distinct mortality tables because reference to gender (1) is more equitable: the greater the risk assumed, the lower the periodic benefit paid; (2) more accurate: greater precision in estimating longevity is achieved by recognizing the difference between male and female mortality rates; and (3) promotes soundness: the obligations of the annuity fund will match the available resources for payment of annuities.

Annuities exist because no one can accurately predict the length of an individual's life. Studies purporting to show a coincidence or "overlap" in dates of death of a group of otherwise similarly situated males and females, made *after they have died*, are essentially irrelevant.

Finally, this Court's holding in *Manhart* does not compel the result reached by the Ninth Circuit. Even in *Manhart*, where the discrimination was found to exist "on [the] face" of the plan, this Court preserved the opportunity to show that the use of sex as a risk classifier was "reasonably necessary to the normal operation" of the plan. 435 U.S. at 716 n.30. The reasons supporting the use of sex-distinct tables set forth below satisfy the test of *Manhart*.

The decision of the Ninth Circuit should be reversed.

ARGUMENT

REVERSAL IS REQUIRED BECAUSE PLAINTIFFS FAILED TO DEMONSTRATE THAT DEFENDANTS ACTED WITH AN INTENT TO DISCRIMINATE AGAINST WOMEN

A. Discriminatory Motivation Must Be Shown for Plaintiffs to Prevail

The decision of the Ninth Circuit respecting discriminatory intent or animus in Title VII disparate treatment cases focuses on *Manhart* in which the issue was not discussed, and ignores, *e.g.*, *Burdine*, in which the subject was treated at length. The result is a finding of discrimination where admittedly no intent to discriminate was present.[3] Such a result, we submit, is in error.

The subject of discriminatory intent or animus as a prerequisite to Title VII claims of disparate treatment has been raised and litigated in a host of cases. *E.g.*, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579-80 (1978); *Board of Trustees* v. *Sweeney*, 439 U.S. 24, 25 (1978) (*per curiam*); and *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05 (1973). Thus, in *Furnco*, reiterating the rationale of *McDonnell-Douglas*, the Court stated (438 U.S. at 579-80) that a plaintiff's *prima facie* evidence of disparate treatment under Title VII is "simply proof of actions taken by the employer from which we infer discriminatory animus . . . ," which inference may be rebutted by the defendant. The Court

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3 The district court found no "purposeful invidious gender-based discrimination" in Arizona's arrangements with independent insurers and thus found no violation of the Fourteenth Amendment below. 486 F. Supp. at 651.

went on to leave no doubt that a "determination as to motivation" must be made in considering such a claim. *Id.* In that respect a plaintiff is also entitled to attempt to prove that the defendant's explanation is a mere pretext, covering a discriminatory intent. *Id.* But, as stated in *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977), "proof of discriminatory intent is critical" in a disparate treatment case.

Most recently, in *Burdine*, 450 U.S. at 253, also a Title VII case, this Court reaffirmed the rule (citing *Sweeney*) that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." The intent requirement set forth in *Burdine* is no mere fact-finding mechanism, but an affirmative, substantive burden on plaintiffs and a necessary element of their case. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Ligons* v. *Bechtel Power Corp.*, 625 F.2d 771, 773 (8th Cir.), *cert. denied*, 449 U.S. 983 (1980); and *Jackson* v. *U.S. Steel Corp.*, 624 F.2d 436, 442 (3d Cir. 1980).

Virtually every other Circuit Court to have addressed this question since *Furnco* has reached the same conclusion.[4] For example, as the First Circuit stated in *Loeb* v.

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4 *E.g.*, *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1011-14 (1st Cir. 1979); *Sweeney* v. *Board of Trustees*, 604 F.2d 106, 108-09 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *Knight* v. *Nassau Cty. Civil Service Comm'n*, 649 F.2d 157, 161 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981); *Scott* v. *Univ. of Delaware*, 601 F.2d 76, 80-81 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Wright* v. *Nat'l Archives & Records Service*, 609 F.2d 702, 713-14 (4th Cir. 1979); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Ekanem* v. *Health & Hospital Corp.*, 589 F.2d 316, 319-20 (7th Cir. 1978); *Kirby* v. *Colony Furniture Co.*, 613 F.2d 696, 702 (8th Cir. 1980); *Royal* v. *Missouri Highway and*

Textron, supra, cited with approval in *Burdine*, 450 U.S. at 258, when discussing the proper framework for consideration of claims of disparate treatment, "the ultimate question is . . . whether [the defendant's action] was unlawfully motivated" (600 F.2d at 1014), and the "focus is to be on the employer's motivation . . . and not on its business judgment." *Id.* at 1012 n.6. In rebuttal, "the plaintiff must prove that the defendant's reason was a pretext for discrimination . . . *i.e.,* that the defendant's action was *not* based on the reason given." *Id.* at 1012. (Emphasis in original.) That is, the plaintiff must prove "that, 'but for' his employer's motive to discriminate against him because of . . . [sex]," the employer's action would not have been taken. *Id.* at 1019. No evidence here exists of any discriminatory intent on the part of Arizona, or anyone else, to discriminate against women and, as noted, the district court below found none.

The absence of an intent to harm women in these circumstances is no better demonstrated than by reference to insurers' use of sex-distinct tables in *life insurance*. In life insurance, use of sex-distinct tables results in lower cost of death benefits for women when compared to similarly situated men because, as a group, the rates of women's mortality at all ages are lower. Thus, the practice neither favors one sex nor disadvantages the other. The EEOC in the *Colby* case made the remarkable claim that the effect of the use of sex-distinct mortality tables

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Transportation Comm'n, 655 F.2d 159, 163 (8th Cir. 1981); *Ward* v. *Westland Plastics, Inc.*, 23 Fair Empl. Prac. Cas. (BNA) 128, 129 (9th Cir. 1980); *Piva* v. *Xerox Corp.*, 654 F.2d 591, 594 (9th Cir. 1981); *Coe* v. *Yellow Freight Systems, Inc.*, 646 F.2d 444, 448 (10th Cir. 1981); *Valentino* v. *United States Postal Service*, 674 F.2d 56, 60 n.1 (D.C. Cir. 1982).

was simultaneously to discriminate against all males and all females in the TIAA-CREF system. But, as Judge Aldrich there stated (589 F.2d at 1141):

> The smaller individual annuity payment to women is not a chauvinistic distinction. The use of such mortality tables produces the converse situation in the case of life insurance.

See Benston, *supra*, at 530 n.126.

Insurers continue to monitor changes in mortality rates. If the difference between male and female mortality rates narrows (it has, on the contrary, been widening) differences in benefit rates will also be narrowed. The motive behind using sex-distinct tables is thus the achievement of accuracy, financial soundness and stability, not a desire to harm or discriminate against women in annuities or, for that matter, against men in insurance. Discrimination "*against*" members of one sex or the other, which is prohibited by Title VII (§ 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)(1976)), is quite different from differentiation *between* the sexes, which is what insurers do under state insurance laws. *See* Kimball, *Reverse Sex Discrimination: Manhart*, 1979 American Bar Foundation Research Journal 85, 110-11 (No. 1, Winter).

The application of these principles in the present context is aptly illustrated by *Peters*, which held, *inter alia*, that Wayne State University, the employer, was not liable under either a disparate treatment or a disparate impact theory for choosing TIAA-CREF annuities to fund retirement benefits for its employees. In *Peters*, as here, the District Court held that "defendants did not intentionally discriminate against women. . . ." 476 F. Supp. 1343, 1351 (E.D. Mich. 1979). The Court of Appeals reaffirmed this finding, and, relying on the *McDonnell-*

Douglas/Furnco/Burdine line of cases, held (5-7a) that lack of discriminatory intent precluded liability on a disparate treatment theory:

> Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting with the intent to discriminate. [Citing *Furnco* and *Burdine*]
>
> * * *
>
> In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.
>
> Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne State has not violated Title VII according to a disparate treatment analysis.

B. Fallacy of a *Per Se* Approach

The Ninth Circuit was of the view that the mere use of sex-distinct tables, in and of itself, was "facially discriminatory" (671 F.2d at 334) and thus eliminated any requirement that Arizona's "animus in adopting the plan" be shown (*id.*). Such a *per se* approach to the issue, based solely upon the authority of two Ninth Circuit decisions almost a decade old,[5] completely disregards this Court's repeated statements of a contrary rule. "Facial" discrimination apparently means that a plan, on its face, treats members of one sex differently from members of the other. This, however, is nothing more than "disparate treatment" as defined by this Court in *Teamsters*, 431 U.S. at 335-36 n.15:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer *simply treats some people less favorably than others because of their . . . sex* . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. (Emphasis supplied).

Nor may it properly be suggested that the use of a mortality table with male and female mortality separately stated—the mere act of classification—establishes the

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5 *Krause* v. *Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973); *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972).

discriminatory intent required by Title VII. Under such a *per se* analysis, cases such as *Burdine* and *McDonnell-Douglas* would supposedly be irrelevant here because there is no dispute that such tables were employed. But, as the Court in *Peters* held (6a), the fact that a *distinction between* males and females has been made does not mean that an intent to *discriminate against* one sex or the other has been shown.

If the mere use of the sexual classifications "male" and "female" were enough to establish intentional (and unjustifiable) discrimination, then *Manhart* should have been a simple *per se* decision. It was not. *Manhart* itself establishes that "disparate treatment" is not a *per se* violation of Title VII.[6] This Court there made clear that defendants may show the use of sex-distinct tables to be "reasonably necessary to the normal operation of the . . . retirement plan" and thus justify their actions even if, as was found in *Manhart*, they are discriminatory on their face (435 U.S. at 716 n.30). The defense was available there even though, as observed by the First Circuit, "by accident, or design, *Manhart* brought to the Court the case that presented the fewest difficulties, and the most conspicuous discrimination, if discrimination there were." (*Colby, supra*, 589 F.2d at 1143).

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6 Indeed, even in the context of alleged Constitutional discrimination, this Court has made clear that a *per se* approach does not apply. Thus in *Univ. of Calif. Regents* v. *Bakke*, 438 U.S. 265 at 303 (1978), it was stated that "the Court has never viewed such classification [by gender] as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis"; and that even racial classifications "are not *per se* invalid under the Fourteenth Amendment." *Id.* at 356.

Further, plaintiff's *per se* approach would support the claim that *any* mortality table reflects an intent to discriminate in the case of life insurance against the elderly in favor of the young, and in the case of annuities against the young in favor of the elderly. Just as there is an indisputable and unchallenged relationship between age and mortality (sixty year olds on average live more years than similarly situated sixty-five year olds), there is the same relationship between gender and mortality. Just as no one has seriously suggested that mortality tables reflect an intent to discriminate against the elderly, simple "[c]ommon sense" (*Peters*, 9a) compels the conclusion that there is likewise no intentional discrimination in the use of sex-distinct tables. The insurer's interest is not in sexual discrimination, but in predictions of longevity.

The relationship of gender to longevity is not of the insurer's creation, and if the difference in male-female mortality disappeared, so would the need to use sex-distinct tables. Further, as this Court put it while discussing alleged gender discrimination under the Constitution in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 277, 279 (1979):

> [D]escribing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.
>
> * * *
>
> "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. (Footnote omitted.)

There can be here no valid claim of *per se* liability.

C. The Basis for Arizona's Justification

Arizona here asserts that the "marketplace" limits its ability to provide any other form of annuity for its participants—that no insurer offers annuities that do not take age and sex into account in calculating benefits. The unavailability of other options is, in and of itself, the articulation of a justification avoiding Title VII liability.[7] A factor, not discussed below because of the absence of insurers as parties here, is *why* no other alternatives are made available in the marketplace. The facts in this regard, developed by TIAA-CREF in its own litigation respecting the same issue, are typical and illustrative.

i. Equity, accuracy, soundness

The trial court record made in the *Peters* case, shows that insurers use sex-distinct mortality tables not in order to discriminate against or disadvantage women, but to achieve the nondiscriminatory purpose of greater equity, accuracy and soundness in their retirement plans and that they do so in accord with long-standing and universally accepted actuarial and insurance standards. The district court judge in *Peters* (476 F. Supp. at 1348) fully credited the testimony of defendants' experts that:

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7 Not only is the Ninth Circuit's *per se* approach incorrect, but, in justifying its dealings with independent insurers, all of whom use sex-distinct tables, Arizona did not bear a burden of "persuasion," but rather one of "articulation." Thus, applying *McDonnell-Douglas*, the decision in *Burdine* sets out (450 U.S. at 252-53) the "basic allocation of burdens and order of presentation of proof" in a Title VII discriminatory treatment case. Assuming that the plaintiff has satisfied her burden of establishing a *prima facie* case of discrimination, the defendants may "articulate" (*Sweeney*, 439 U.S. at 25) some legitimate, nondiscriminatory reason for the alleged discriminatory act which, unless shown to be a pretext, will defeat the plaintiff's claim.

> [B]ecause women as a group will live longer, use of separate life-expectancy tables for men and women is necessary to correctly predict the number of monthly payments required for each group of annuitants. This will assure that the total payment to each retiree is "actuarially equivalent," though the periodic payments to women are less.

And, Judge DeMascio there also expressly found that "the defendant's plan utilized proper actuarial considerations and men as a group and women as a group receive the same actuarial value for their money." *Id.* at 1349.

As the District Court found in *Peters*, the only two factors used by insurers in offering annuities are the immutable characteristics of age and sex. (*Id.* at 1348). Plaintiffs there attempted to suggest the relevance of other factors, prompting the Court to respond (*Id.* at 1345 n.2):

> [P]laintiffs contended that they would demonstrate that defendants could use other non-discriminatory life expectancy predictors, such as health, weight, smoking, etc., in computing annuity rates. The evidence, however, demonstrated that only the immutable factors of age and sex could be used.

Some have argued that because race is not considered as a risk classifier for annuities, sex should not be either, it being assumed that the mortality of non-whites' is demonstrably higher than that of whites. The analogy has no basis in fact. General population statistics show that at the higher ages (*i.e.*, those ages relevant for payment of annuity benefits) there is virtually no difference in white—non-white life expectancy. National Center for Health Statistics, 2 *Vital Statistics of the United States* 5-13 (1980). Moreover, the same statistics show that the same difference in *male-female* mortality rates exists for

non-whites as for whites, again confirming the importance of the factor of sex to risk classification for annuities. *Id.*

There can be no dispute that both age and gender have a substantial impact on mortality. Obviously, younger persons will on average live more years beyond a given date than similarly situated older persons. There is also no dispute that females are likely to live a greater number of years than males of the same age—at age 65 some four years more in the TIAA-CREF system. Judge Aldrich spelled out the consequences of greater female longevity in *Colby* (589 F.2d at 1144-45):

> Manifestly, an insurance company cannot disregard this fact, any more than it can disregard age, or fail to require premiums and create reserves that will fund its total ultimate obligations in light of the expectancy of its policyholders. Regardless of what one individual woman may do in the way of paying in and taking out, if women in their totality are to take out more than their male counterparts, either they, or someone else, must pay in more. Even though an individual woman may prove to be shortlived, to add her to the group requires a larger premium contribution than if she had been a man.

Thus, an insurer's use of sex-distinct mortality tables results in more equitable treatment of all annuitants. Men and women, regardless of their age, receive the same actuarial, or present value per dollar of premium paid. But given equal accumulations for men and women in individual accounts, payment of the same periodic benefits to each would mean that every woman would receive an annuity of greater present value than would any man of the same age.

ii. The "overlap"—20/20 hindsight

The Court below referred (671 F.2d at 332 n.1) to an argument sometimes made in support of disregarding sex as a risk classification factor derived from a hindsight comparison of dates of death among similar groups of males and females (labeled " 'overlap' graphs" by the district court in *Peters* (476 F. Supp. at 1345 n.2)). The argument suggests that, using TIAA's current mortality table, approximately 80% of the dates of death for men coincide with dates of death for women. While such graphs confirm that women as a group outlive the men by a substantial margin, they are otherwise essentially irrelevant to the computation and payment of annuities. *See* Benston, *supra*, at 515-17 n.72. In Judge DeMascio's words in *Peters*, where this precise assertion was made, such comparisons are, at best, "inconclusive." 476 F. Supp. at 1345 n.2. The Sixth Circuit agreed (9a):

> Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age. (Emphasis in original).

In essence, the graphs merely reflect the self-evident fact that because there are only a limited number of years within which a group of persons can die after retirement,

a retrospective comparison of their dates of death will always show some sort of "overlap." An almost identical overlap, for example, can be shown to exist where the dates of death of a group of women aged 65 are matched with those for a group of *women* aged 60. Any suggestion that the 60-year-old group should receive benefits at the same rate as the 65-year-old group would be as illogical as the suggestion that a male/female overlap furnishes a serious reason for equalizing male/female benefits. In short, hindsight comparisons of dates of death are of no relevance to the calculation of benefits to be paid in the future to living annuitants whose dates of death cannot be known in advance.

iii. *Manhart* is not to the contrary

Nor can it be said that *Manhart* in any way has rejected the insurance and actuarial justification discussed above. The scope of the decision in *Manhart* was carefully delineated at the outset, when this Court noted that "[n]o private insurance company is involved in the administration or payment of benefits" (435 U.S. at 705) and later when it explained that "we do not suggest that [Title VII] was intended to revolutionize the insurance and pension industries." (*Id.* at 717.) *Manhart* concerned (a) an employer-operated, defined benefit plan similar to those found in industry and government wherein (b) employer contributions are grouped or pooled, not allocated to individual accounts. Retirement benefits in such plans are computed, not from individually accumulated amounts, but pursuant to a formula which normally establishes benefits as a percentage of the employee's final average salary.[8] The cost to the employer to provide equal periodic

8 Thus, the basic option in the *Manhart* plan was a "formula pension" wherein monthly benefits were calculated on the basis of a formula: 2% of average monthly salary paid during the last year of employment times the number of years of employment. 435 U.S. at 705 n.3.

benefits at retirement is greater for women than for similarly situated men. Such "formula benefits" avoid the question of inequity or subsidization that arises from treating different classes of risks the same. *See, e.g., Connolly* v. *Pension Benefit Guar. Corp.*, 581 F.2d 729 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

CONCLUSION

Plaintiffs did not demonstrate any intent on the part of defendants to discriminate against women in the use of sex-distinct mortality tables. The use of such tables proceeds, not from any desire to harm women, but from the indisputable difference in male-female longevity. Arizona's inability to find an insurer offering annuity benefits calculated on any basis other than age and sex is a reflection of the importance of those two factors in setting annuity benefit rates. Their use is, accordingly, fully justified. In light of all the foregoing, the finding of Title VII liability against Arizona herein should be reversed.

Respectfully submitted,

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November 26, 1982

Opinion of the Sixth Circuit
in *Peters* v. *Wayne State University*

MILDRED PETERS, et al.,

Plaintiffs-Appellees,

—v.—

WAYNE STATE UNIVERSITY (79-1670), TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND (79-1658, 79-1671),

Defendants-Appellants.

Nos. 79-1658, 79-1670, 79-1671

United States Court of Appeals,
Sixth Circuit

October 14, 1982

Before:

MARTIN, *Circuit Judge*;
PHILLIPS and BROWN*, *Senior Circuit Judges.*

BOYCE F. MARTIN, JR., *Circuit Judge*

This case requires us to decide whether Title VII prohibits an insurance company from operating or an employer from selecting a retirement benefits plan under which the size of monthly annuity payments is calculated from sex-segregated mortality tables. Wayne State University offers its faculty and certain other employees an annuity pension plan administered by

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(o) on June 16, 1982, and became a Senior Circuit Judge.

Teachers Insurance and Annuity Association and the College Retirement Equities Fund. Under this plan, female annuitants receive smaller monthly payments than similarly situated male annuitants. This distinction is based on the actuarial probability that women will live longer than their male counterparts.

The plaintiffs, female employees of Wayne State, brought this sex discrimination action in the District Court for the Eastern District of Michigan. The District Court found that both Teachers Annuity and Wayne State had violated section 703(a) of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a). *Peters v. Wayne State University*, 476 F.Supp. 1343 (E.D. Mich. 1979). We disagree and reverse.

Wayne State is a state-supported university located in Detroit, Michigan. Teachers Annuity is a pair of companies designed specifically to serve the unique retirement needs of academic employees. Teachers Insurance and Annuity Association is a legal reserve life insurance company; College Retirement Equities Fund is a companion corporation organized to provide a greater variety of insurance services. Teachers Annuity enables employees of academic institutions to move from one institution to another because the employees take their personal retirement contracts with them as they move. Five hundred fifty thousand employees at over three thousand institutions contract directly with Teachers Annuity for retirement annuity benefits.

Wayne State does not require its employees to participate in the Teachers Annuity retirement plan. Employees who choose to do so contribute to the fund five percent of their salaries matched by a ten percent Wayne State contribution. Each contribution automatically purchases retirement benefits which vest immediately and irrevocably in the individual employee. At retirement, employees must select among several annuity payment options.

If a woman selects a "single life option," which provides monthly payments for life, she will receive smaller payments than a man of the same age and accumulated contributions. Teachers Annuity computes the annuities from standard mor-

tality tables which reflect the fact that, as groups, women live longer than men. At age sixty-five a woman's life expectancy is four years longer than a man's. To compensate for women's longevity, female annuitants receive smaller monthly payments. However, the present actuarial values of women's and men's benefits are identical.

The District Court found that both Teachers Annuity and Wayne State violated Title VII. Although women and men *as groups* received equal benefits, the District Court relied on *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978), to find that the retirement plan discriminated against the *individual* female annuitant.

Section 703(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an *employer*—
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex . . . .

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Federal courts have construed the statutory language to include, as employers, employers' agents and those to whom employers have delegated responsibility for employee compensation. As the Supreme Court noted in *Manhart*, "[A]n employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to 'any agent' of a covered employer . . . ." 435 U.S. at 718, n.33.

In the present case, the District Court found that Teachers Annuity was an "employer" within the meaning of Title VII because "[t]he ties between WSU and TIAA/CREF are too great to allow them each to deny liability on account of the actions of the other." 476 F. Supp. at 1350. The court emphasized the fact that Teachers Annuity's "sole reason" for existence was to provide individually vested insurance contracts to employees of educational institutions.

The District Court's characterization of Teachers Annuity as an "employer" is clearly erroneous. Fed. R. Ap. P. 52(a). Obviously Teachers Annuity does not "employ" the plaintiffs in the conventional sense of the word. Neither does Wayne State retain Teachers Annuity as an agent or delegate to it any aspect of employee compensation. *See Los Angeles v. Manhart*. On the contrary, Wayne State determines the eligibility requirements for participation in the Teachers Annuity plans and sets the contribution levels for itself and its employees. Teachers Annuity's responsibility is limited to management of the retirement fund and disbursement of individual annuities. Furthermore, Wayne State exercises no control over Teachers Annuity, otherwise essential to a principal agent relationship. *NLRB v. Local No. 64, Falls Cities District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO*, 497 F.2d 1335, 1366 (6th Cir. 1974). *See generally* 2A C.J.S. Agency § 6; Restatement (Second) Agency § 14. Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity plan. Indeed, the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone. Wayne State has repeatedly and unsuccessfully attempted to persuade Teachers Annuity to alter its payment policy.

Teachers Annuity is not an "employer" for the purposes of Title VII; Wayne State has selected Teachers Annuity's retirement planning services for its employees. Teachers Annuity is an insurance company providing a service to Wayne State and Wayne State's employees. *Manhart* expressly held, "[Title VII] was not intended to revolutionize the insurance and pension industries." 435 U.S. at 717. We decline to hold that an insurance company may become liable under Title VII simply by furnishing its services to a Title VII employer.

An insurance company is not bound by Title VII because it furnishes its services to a Title VII employer. The reverse is not true. A Title VII employer cannot avoid its liabilities under the statute by claiming it has selected services which "happen" to

discriminate against women. Wayne State emphasizes that Teachers Annuity's acts are lawful, that Teachers Annuity contracts directly with Wayne State employees, and that Wayne State's role is primarily administrative rather than policy-making. None of these facts relieves Wayne State of responsibility for *choosing* Teachers Annuity's retirement plan for its employees. Accordingly, Wayne State would be liable under Title VII if Teachers Annuity's plan discriminated against female annuitants. We hold, however, that the use of sex-segregated mortality tables to calculate retirement annuities does not violate Title VII if the actuarial value of the annuities is equal for similarly situated women and men.

"It is well established under Title VII that claims of employment discrimination . . . may arise in two different ways." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 581-582 (1978) (Marshall concurring in part and dissenting in part). The plaintiff must show either "disparate treatment" or "disparate impact." "The central focus of the inquiry . . . is always whether the employer is treating 'some people less favorably than others *because of* their . . . sex.' " *Id.* at 577 (emphasis added) *citing International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

The District Court determined that Wayne State had violated Title VII without first finding either "disparate treatment" of women by Wayne State or a "disparate impact" on women of a Wayne State policy. Rather, the court relied *solely* on the holdings and dicta of *Manhart. Peters*, 476 F. Supp. at 1349. *See also Spirit v. TIAACREF*, Nos. 79-7715, 7737, and 7739 (2d Cir. decided Sept. 29, 1982); *EEOC v. Colby College*, 589 F.2d 1139 1st Cir. 1978). Careful analysis of Wayne State's actions reveals neither disparate treatment nor disparate impact. In short, there is no evidence that Wayne State treats women less favorably than men *because of* their sex.

Disparate treatment occurs when an employer bases employment decisions on an impermissible criterion, such as sex. An employer need not treat women and men in exactly the same manner. Title VII merely forbids the employer from acting

with the intent to discriminate. *Furnco Construction Co. v. Waters*, 438 U.S. at 579-580. *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Supreme Court has repeatedly discussed the proof requirements in disparate treatment cases. The plaintiff has the initial burden of showing that the employer's practices, "otherwise unexplained, are more likely than not" impermissibly motivated. *Id.* at 254, *citing Furnco*, 438 U.S. at 577. After the plaintiff has made out a prima facie case, the defendant has the opportunity to rebut the presumption of discrimination by showing a "legitimate non-discriminatory reason" for its decision. *Burdine*, 450 U.S. at 254; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Finally, the plaintiff has the opportunity to show that the defendant's "reason" is a pretext to mask a discriminatory decision. *McDonnell Douglas*, 411 U.S. at 804. In all cases, the plaintiff retains the ultimate burden of persuading the trier of fact that the employer intentionally discriminated. *Burdine*, 450 U.S. at 256.

In the present case, Wayne State's retirement plan differentiates between women and men. Female annuitants receive smaller monthly payments than similarly situated male annuitants. Wayne State rebutted this prima facie showing of disparate treatment by articulating a legitimate non-discriminatory reason for treating female and male annuitants differently. Sex-segregated mortality tables are used to calculate payments according to accepted actuarial practices; the tables are sex-segregated simply because women live longer than men. Women receive smaller annuities over a longer period of time to ensure that the value of the retirement plan for women and men is equal.

Plaintiffs failed to carry their ultimate burden of persuasion under the *Burdine* analysis. They did not demonstrate at trial that Wayne State's motivation was discriminatory or improper in any way. Plaintiffs did not show that Wayne State's reliance on longevity to calculate benefits was a pretext to mask its intention to disadvantage and harm female annuitants. Wayne

State has not violated Title VII according to a disparate treatment analysis.

Neither has Wayne State violated Title VII according to a disparate impact analysis. A disparate impact occurs when an employer's facially neutral policy burdens one class more than another. "[P]ractices that are fair in form, but discriminatory in operation" produce a "disparate impact." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). *See also Dothard v. Rawlinson*, 433 U.S. 321 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). To defend against a claim of disparate impact, an employer must show that its practice is necessarily and closely related to a business purpose. *Griggs*, 401 U.S. at 431.

Plaintiffs in this case claim that Wayne State's retirement plan has a disparate impact on women because women receive smaller monthly annuity payments than men. Plaintiffs focus on one fact, that the monthly checks received by women and men differ; they disregard all other aspects of the retirement plan. The District Court's focus and conclusion agreed with the plaintiffs'. "[T]he use of separate mortality tables . . . is discriminatory as applied to an individual woman annuitant." 476 F. Supp. at 1349. Both the District Court and the plaintiffs rely solely on *Los Angeles v. Manhart* for the proposition that "employer pension plans must be non-discriminatory on an individual basis, rather than on class basis." *Id.*

In *Manhart* the Supreme Court invalidated Los Angeles' retirement programs because the city required women to contribute more than men to receive equal retirement benefits. The difference in contribution rates stemmed from standard mortality tables reflecting the fact that women as a group live longer than men as a group. The city deducted the contributions directly from all employees' paychecks. The Court acknowledged the validity of the mortality tables but declared that Title VII protects *individuals*, not groups. The Court found the city liable for sex discrimination against each individual woman who received less take-home pay than a man for the same job.

Two significant factual differences exist between *Manhart* and the present case. In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. Consequently they receive equal compensation. Furthermore, in *Manhart* the employer operated the pension fund. The city collected the contributions, managed the accumulated money, and calculated the disbursement rates. Wayne State does not operate the pension fund for its employees. Rather Teachers Annuity, an independent insurance company, manages the accumulated money in the individual accounts and calculates the disbursement rates.

These factual differences are significant because the Supreme Court expressly limited its *Manhart* holding along these lines: "All that is at issue today is a requirement that men and women make *unequal contributions* to an *employer-operated* pension fund." 435 U.S. at 717 (emphasis added). The Court's primary concern, that women received smaller paychecks for the same work, is not a factor in the present case.

Two landmark industrial benefits cases preceded *Manhart*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), *reh. denied*, 429 U.S. 1079 (1977), and *Geduldig v. Aiello*, 417 U.S. 484 (1974). In both these cases the employer offered a disability benefits plan which excluded pregnancy as a disability. The Supreme Court found no sex discrimination under Title VII, in *Gilbert*, or under the Equal Protection Clause, in *Geduldig*. The plaintiffs failed to demonstrate either disparate treatment or a disparate impact from the exclusion of pregnancy as a disability.

Like *Gilbert* and *Geduldig*, the present case concerns a benefit plan, not employee wages. In all three cases, the employers paid or required equal contributions for both women and men. Justice Rehnquist's analysis in *Gilbert* quoting *Geduldig* controls the present case:

> As in Geduldig, we start from the indisputable baseline that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes," 417 U.S., at 497 n.20.
>
> * * *
>
> The "package" going to relevant identifiable groups we are presently concerned with—General Electric's male and female employees—covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Id., at 496-497 . . . .
>
> As there is *no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme.*

429 U.S. at 138-139 (citations and footnotes omitted) (emphasis added). For the same reasons we hold that Wayne State's retirement benefits package which offers female and male annuitants benefits of equal value does not violate Title VII. The retirement plan is not worth more to men than to women.

Common sense supports this holding. Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age.

Gender neutral tables would not "equalize" the treatment of women and men. If annuities were calculated on gender neutral tables, women and men would receive equal payments. However, Wayne State would have to contribute more to a

woman's retirement fund than to a man's. Consequently men would receive less immediate compensation. Furthermore, women living to the predicted statistical age for women would receive greater total benefits than men living to the predicted statistical age for men.

The retirement plan which Wayne State offers its employees differentiates between women and men on the basis of longevity solely. Wayne State's selection of a retirement plan which calculates annuities from sex-segregated mortality tables is not the "kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court found to be the intention of Congress to remove." *McDonnell Douglas*, 411 U.S. at 806, *quoting Griggs*, 401 U.S. at 431. It is not a "built-in headwind" unrelated to an individual's longevity because longevity cannot be measured on an individual basis. We conclude that Wayne State has not violated Title VII by providing women and men equal retirement annuity benefits with different disbursement rates.

Because our decision on the issue of Title VII liability disposes of the case, we need not address the other issues raised by the parties.

The decision of the District Court is reversed.

(SHOW) PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00052 CFX

SHORT TITLE AZ Governing Comm., et al. DOCKETED: Jul 12 1982

VERSUS Norris, Nathalie

Date	Proceedings and Orders
May 12 1982	Application for extension of time to file petition and order granting same until July 12, 1982 (Rehnquist, May 13, 1982).
Jul 12 1982	Petition for writ of certiorari filed.
Jul 22 1982	Order extending time to file response to petition until September 3, 1982.
Jul 29 1982	Brief amicus curiae of Amer. Council of Life Ins. filed.
Aug 19 1982	Brief amicus curiae of American Academy of Actuaries filed.
Sep 4 1982	Brief amicus curiae of California (Teachers' Retirement System) filed.
Sep 7 1982	Brief of respondent Nathalie Norris in opposition filed.
Sep 1 1982	Brief amicus curiae of National Association of Insurance Commissioners filed.
Sep 15 1982	DISTRIBUTED. October 8, 1982
Sep 23 1982	Reply brief of petitioner AZ Governing Comm. filed.

CONTINUE (

(SHOW) PROCEEDINGS AND ORDERS DATE: 033083

CASE NBR 82-1-00052 CFX

SHORT TITLE AZ Governing Comm., et al. DOCKETED: Jul 12 1982

VERSUS Norris, Nathalie

Date	Proceedings and Orders
Oct 12 1982	Petition GRANTED.
	**********
Nov 22 1982	Brief amicus curiae of New York State Teachers Ret. filed.
Nov 24 1982	Joint appendix filed.
Nov 24 1982	Brief of petitioner AZ Governing Comm. filed.
Nov 24 1982	Brief amicus curiae of American Academy of Actuaries filed.
Nov 24 1982	Brief amicus curiae of Equal Employment Advisory Council filed.
Nov 26 1982	Brief amicus curiae of Amer. Council of Life Ins. filed.
Nov 30 1982	Brief amicus curiae of Natl. Assn. of Ins. Commr.'s filed.
Nov 30 1982	Brief amicus curiae of Teachers Ins. & Anuity Assn. filed.
Nov 24 1982	Brief amicus curiae of State of Florida filed.
Dec 16 1982	Order extending time to file brief of respondent on the merits until January 8, 1983.
Jan 6 1983	Brief amicus curiae of American Nurses Assn. filed.

CONTINUE (

CASE NBR 82-1-00052 CFX

SHORT TITLE AZ Governing Comm., et al. DOCKETED: Jul 12 1982

VERSUS Norris, Nathalie

Date	Proceedings and Orders
Jan 7 1983	Brief amicus curiae of Amer. Assn. of University Professors, et al. filed.
Jan 7 1983	Brief amicus curiae of Lawyers Comm. For Civil Rights Under Law, et al. filed.
Jan 10 1983	Brief amicus curiae of Natl. Insurance Consumer Org. filed.
Jan 10 1983	Brief amicus curiae of ACLU, et al. filed.
Jan 11 1983	Brief amicus curiae of AFL-CIO, et al. filed.
Jan 11 1983	Brief of respondent Nathalie Norris filed.
Jan 11 1983	Brief amicus curiae of Eight Individual Actuaries filed.
Jan 13 1983	Record filed.
Jan 13 1983	Certified original record & C.A. proceedings, Volumes I, II, III & IV received.
Feb 15 1983	SET FOR ARGUMENT. Monday, March 28, 1983. (3rd case)
Feb 15 1983	CIRCULATED.
Mar 10 1983	Reply brief of petitioner AZ Governing Comm. filed.

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SHORT TITLE AZ Governing Comm., et al. DOCKETED: Jul 12 1982

VERSUS Norris, Nathalie

Date	Proceedings and Orders
Mar 28 1983	ARGUED.